IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-555

CLYDE R. DONNELL, et al., *Appellants*

v.

UNITED STATES, et al., *Appellees*

&

EDDIE THOMAS, SR., et al., *Intervenors*

On Appeal from the United States District Court for the District of Columbia

JURISDICTIONAL STATEMENT

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THOMAS F. AKINS, PAUL PRIDE, JAMES ANDREWS,
Appellants

v.

UNITED STATES AND BENJAMIN CIVILETTI,
ATTORNEY GENERAL,
Appellees,

&

EDDIE THOMAS, SR. et al.,
Intervenors.

On Appeal from the United States District Court for the District of Columbia

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JURISDICTIONAL STATEMENT

Members of the Board of Supervisors for Warren County, Mississippi, appeal from the final judgment of

a three-judge § 5 court for the District of Columbia holding that for purposes of preclearance under § 5 of the Voting Rights Act the "non-retrogression" standard established in *Beer* v. *United States,* 425 U.S. 130 (1976), requires "a black population of at least 65% . . . to provide [black] voters with an opportunity to elect a candidate of their choice," and that professionals engaged in drafting redistricting plans must consider "the black population percentage required in a district to give blacks an equal chance of electing a candidate of their choice."

OPINIONS BELOW

The case has generated significant judicial activity. The decision appealed from is unreported and reprinted in Appendix A. A Supplemental "Order" issued by the court below on August 23, 1979, is found in Appendix B. A bench opinion issued by the Circuit Court of Warren County on August 3, 1979, is reproduced in Appendix C. An opinion by Fifth Circuit Judge Charles Clark, sitting by designation as a district judge, issued on September 7, 1979, is found in Appendix D. A second opinion, dated September 20, 1979, is found in Appendix E. The unpublished opinion of a three-judge § 5 court sitting in the Southern District of Mississippi previously granting preclearance is found in Appendix F.

JURISDICTION

The judgment of the three-judge court for the District of Columbia was entered on July 31, 1979. A notice of appeal to this Court was filed on August 6, 1979, and is reproduced in Appendix G. This appeal is

being docketed within ninety days from the entry of final judgment below. Jurisdiction is invoked under 42 U.S.C. § 1973c. *Beer* v. *United States,* 425 U.S. 130 (1976).

QUESTIONS PRESENTED

I. In the drafting of redistricting plans, are professionals required to consider the black population required to give black citizens an equal chance of electing candidates of their choice?

II. May social, political and economic evidence currently employed in constitutional voter-dilution cases be utilized by a § 5 court to sustain a decision that due to past discrimination a district must contain a black population of at least 65% or a black voting age population of at least 60% to "provide black voters with an opportunity to elect a candidate of their choice"?

III. If § 5 does warrant a construction which requires covered jurisdictions to compensate for past discrimination, is there a resulting violation of the Fourteenth and Fifteenth Amendments?

IV. Under what circumstances should a § 5 court, after denying declaratory relief, retain jurisdiction in order to insure that any further elections by the covered jurisdiction meet statutory criteria?

STATUTES

In pertinent part, § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c provides:

> [No change in] any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting [may be precleared absent a showing that such change] does not have

the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.

STATEMENT OF THE CASE

I. Background

Warren County is located in the west-central portion of Mississippi. According to the 1970 census, it has a total population of 44,981 of whom 26,474 (58.8%) are white and 18,355 (40.8%) are black. Within the county is one major metropolitan area, the city of Vicksburg, which contains over half of the county's total population and approximately two-thirds of its blacks. Of the 25,478 persons in Vicksburg, 12,824 (50.3%) are white and 12,568 (49.3%) are black.

Under Mississippi law, the county must be divided into five districts for the election of members of the Board of Supervisors, the county's governing body. Although charged with a variety of duties, the Board's primary responsibility is the construction and maintenance of county roads and bridges. This responsibility does not extend into the corporate limits of Vicksburg since the city's governing body provides its own construction/maintenance unit.

From 1929 to 1970, county government functioned under a districting format with practical and constitutional defects. Under what is referred to as the "1929 Plan," (Map 1) three supervisors' districts fell within the city limits of Vicksburg, thereby placing all construction and maintenance responsibility on two supervisors. The plan was also seriously malapportioned, *e.g.*, one rural district (5) had more than twice the

population of one located within the city limits (3). According to the 1970 census, its breakdown by population and race is as follows:

District	Total Pop.	White	Percent White	Black	Percent Black	Other	Percent Other
1	9,827	5,934	60.38%	3,871	39.39%	22	0.22%
2 City	7,566	2,717	35.91%	4,807	63.53%	42	0.55%
3 Dis-	6,217	3,066	49.32%	3,124	50.25%	27	0.43%
4 tricts	7,539	3,321	44.05%	4,206	55.79%	12	0.16%
5	13,832	11,436	82.68%	2,347	16.97%	49	0.35%

In 1970, the county voluntarily undertook to redistrict in an attempt to (1) equalize road, bridge and area responsibilities for each member of the Board of Supervisors as well as (2) meet one-man-one-vote requirements while also (3) maintaining its statutory responsibilities under § 5. The fact that the three majority black districts within the city under the 1929 Plan, each of which contained far fewer than the optimum population of 9,000,[1] were to be melded into districts containing both rural and urban segments has resulted in a major confrontation between county goverment, the Voting Rights Section of the Department of Justice (hereafter the "Department") and the Lawyers' Committee. As a result, no district elections have been held in eight years. This fact, and the procedural history of the "case" in general, bear out Mr. Justice Powell's admonition that there is an immediate "need to bring a measure of common sense" to the application of § 5. *Berry* v. *Doles,* 438 U.S. 190, 201 (1978) (Powell, J., concurring).

[1] With a total population in the neighborhood of 45,000, the 9,000 figure represents minimal percentage deviancy within the five districts.

II. 1970-1977: Three-Judge Court Litigation in the Southern District of Mississippi

A. Background

In 1970 Comprehensive Planners, Inc. (CPI) was retained to draft a county redistricting proposal which was subsequently approved by the Board and submitted to the Department for preclearance. Despite an objection filed by the Attorney General, general elections were held pursuant to the 1970 Plan in November of 1971. Subsequently, on February 12, 1973, after the Board's submission of supplemental data, the Department assumed what was to become its unalterable position (regardless of the submission in question):

> We fully understand that the officials of Warren County did not participate in the formulation of the redistricting plan and that the proposal was drawn without instruction from the county concerning shape and location of the new districts. Our evaluation of the redistricting plan nevertheless reveals that *the effect of the proposed district boundary lines is to fragment areas of black populations concentrations, thereby minimizing the total number of black persons residing in each of the districts* [2] *and diluting black voting strength in Warren County.*[3]

B. Litigation

On March 7, 1973, the United States invoked the jurisdiction of a three-judge court in the Southern Dis-

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[2] The plan as originally drafted was racially neutral, that is, without considering the racial characteristics of the county. On the basis of supplemental information requested by the Department, it was subsequently determined that one district had a 51% black population and another, 56.6%.

[3] Exhibit 6, p. 2, Intervenors First Request for Admission of Facts (Emphasis added.)

trict of Mississippi to enforce its objection. In a series of orders the court enjoined elections scheduled for 1975 as well as the use of the 1970 Plan or any other which had not been precleared under § 5. Finally, pursuant to the Department's suggestion, the county was ordered to submit new plans to the Department, and if preclearance were refused, the three-judge court would determine § 5 compliance and thereafter put into effect a court-ordered plan.

Two plans submitted to the Department by the Board received identical objections, to wit:

> [T]he effect of either plan is to fragment areas of black population and add those fragments to larger areas of white populations, thereby minimizing the number of blacks in each district, and thus unnecessarily diluting black voting strength . . . . Because these [district] lines do not appear to be drawn because of any compelling governmental need and do not respect population concentrations or considerations of the district compactness, [we object] . . . .[4]

Subsequently, in March, 1976, both sides filed plans with the court which, in light of an express finding of "substantial county responsibilities," limited its consideration to only those proposals in which all districts embraced both rural and county areas.[5] The court approved the county's proposal (Map 2) containing reasonably compact districts which extended into the county and produced one district with a 60% black

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[4] Exhibit 13, pp. 1-2, Intervenors First Request for Admission of Facts.

[5] See Appendix F at 32a n.1. This finding precluded review of one Department proposal having districts totally within the city of Vicksburg. *Id.*

population majority and two others at the 42% level. After concluding that the county's plan complied with *Beer* v. *United States,* 425 U.S. 130 (1976) (rendered after the plans at issue were drafted), the court responded to the Department's argument that the county's decision to extend all districts into the rural area in order to equalize road mileage was impermissible because its necessary effect was to preclude isolating voting districts where blacks were concentrated—the city of Vicksburg:

> The Government argues, however, that since road mileage has not been equalized in Warren County for approximately 50 years, it should not be a legitimate consideration. If this intends to urge that the errors of past officials in failing to seek equalization bind the present citizens by waiver or estoppel, it is not well taken. Any court apportionment plan should take into consideration every factor which will make county government in Warren County operate efficiently. The equalization of road mileage will substantially contribute to that efficiency since one of the major duties of the Board of Supervisors is to care for county roads.[6]

Having lost its arguments, the Department, joined by the intervenors represented by the Lawyers' Committee, reversed its position with respect to the authority of the Southern District court to preclear, and after securing a stay of elections ordered under the new plan, appealed to this Court. In the interim, intervenors filed *Thomas* v. *Warren County Board of Elections,* Civ. Act. No. W-76-45(N) (S.D.Miss. 1976), a suit alleging voter dilution under the Fourteenth and Fifteenth Amendments and seeking injunctive relief against fur-

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[6] *Id.* at 35a.

ther implementation of the court-ordered plan. This Court's reversal in *United States* v. *Board of Supervisors,* 429 U.S. 642 (1977), holding that only the District Court for the District of Columbia has jurisdiction to preclear, effectively terminated all litigation then pending in the Southern District of Mississippi. It also returned elected representatives of the county to square one with respect to their attempts to cure the defects of the 1929 Plan.

III. Litigation Before the Three-Judge Court for the District of Columbia

In light of *Beer,* CPI, on the advice of Board counsel, proceeded to develop a plan attuned to the racial characteristics of the county [7] and having two districts with substantial black majorities. The result, a proposal with one district having a 61% black population and another with 60.6%, was submitted to the lower court [8] on March 6, 1978, and is reproduced at Map 3. A statistical comparison of the 1978 Plan with the 1929 Plan (without considering the status of "other" ethnics) reveals the following:

	1929	
District	Population % Black	Population % Black (VAP)
1	39.6	36.4
2	64.0	60.2
3	50.7	45.9
4	55.9	50.5
5	17.3	16.2

[7] Prior to this time, CPI had not taken racial considerations into account in its preparation of redistricting proposals.

[8] Seven years of playing the shell game with attorneys representing the Department precluded any decision with respect to

1978 PROPOSED PLAN

District	Population % Black	Population % Black (VAP)
1	61.0	57.2
2	60.6	58.0
3	40.2	37.2
4	23.8	22.6
5	20.3	18.7

Suit was filed well over a year in advance of the 1979 general elections for a determination of what appellants perceived as the relatively straightforward issue of whether "upgrading" occurs when 60.6% and 61% districts are substituted for three having population percentages of 64, 55.9 and 50.7 or, on the basis of VAP, the substitution of two black majority districts of 57.2% and 58% for those in the 1929 Plan of 60.2% and 50.5%. Following a period of discovery in excess of fifteen months [9] the conflict was crystallized: the Department and the Lawyers' Committee demanded nothing less than two 65% districts and stood ready to introduce what they believed was sufficient political and socio-economic evidence to justify the concept of com-

administrative preclearance. Indeed, by the time the new plan was completed, the Department's conclusion that *Beer* required 65% districts had already been reached. *Compare* United Jewish Organizations v. Carey, 430 U.S. 144 (1977) *with* Map 4 ("settlement proposal" by the Department incorporating two 65% districts for Warren County).

[9] In addition to interrogatories, requests for admission and the like, over 1,800 pages of depositions were taken. Appellants, of course, utilized the period to gather evidence to defend the voter-dilution case they were sure would follow immediately upon the heels of a preclearance grant. See Thomas v. Warren County Board of Elections, *infra*, p. 8.

pensatory (as compared to protective) criteria for what was argued to be a proper construction of § 5.

Over strenuous objection by appellants against the reception of any evidence employed in constitutional, voter-dilution litigation as well as a refusal by the lower court to hear live testimony on the issues raised by appellees (all discovery served as the record), oral argument was held on July 3, 1979, almost a month after June 8, the time set under state law for candidates to qualify for party primaries. Twenty-eight days later, on July 31, the lower court issued its findings of fact and conclusions of law adopting—in total—appellees' factual and legal position.

IV. Chaos

As noted, the lower court's decision was handed down after the final date for qualifying for party primaries. On that day, June 8, the Lawyers' Committee qualified its clients as unopposed candidates for district office *under the 1929 Plan.* Prior to the lower court's denial of declaratory relief on July 31, appellants' motion requesting that it retain jurisdiction after rendering a final decision was denied.[10] Thus, once preclearance was denied, and having knowingly dealt with a covered jurisdiction placed in a state of suspended animation politically, the court left no impediment to prevent what was to be the most devastating and devisive segment of this interminable litigation.

Three days after the denial of declaratory relief, the Lawyers' Committee, reversing its 1976 position that

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[10] Similarly, a motion filed with the three-judge court in the Southern District of Mississippi seeking, among other things, a determination of the scope of its injunction issued to enjoin elections in 1975, was denied on jurisdictional grounds.

no election—even if court ordered—should be held under an election plan perceived as unconstitutional,[11] filed on behalf of its clients in the Warren County Circuit Court seeking mandamus to compel elections under the 1929 Plan. After this was denied (Appendix C), an omnibus motion was filed with the lower court seeking a mandatory injunction requiring the county to conduct elections under the 1929 Plan. Although that court, on August 23, denied the motion, it concluded:

> [A]n election *should* be conducted under the legally enforceable election procedures of 1929, pending preclearance to any new procedures.[12]

In the context of an election commission faced with the utter impossibility of conducting elections under a plan not used since 1967, and a community in political chaos (did "should" mean "must"?), suit was filed in the Southern District by voters seeking to have the 1929 Plan declared unconstitutional under the Fourteenth Amendment. On September 7, 1979, the court agreed and enjoined elections under the plan. Subsequently, it granted a motion to intervene filed on behalf of appellants but denied their request that the litigation be stayed pending review by this Court of the instant case. Thereafter, on September 29, 1979, it fulfilled its perceived constitutional duty and ordered special elections under what was termed a court-ordered "interim plan" placing one district totally within the city of Vicksburg and incorporating two with black populations at 65.3% and 67.06%. Facing the arguments by plaintiffs in that case that a 65% figure was

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[11] See p. 8, *infra*.

[12] Appendix B. (Emphasis added).

not mandated and that the ordering of any elections could result in mooting the instant appeal the court concluded:

> [The plan] also meets the racial standards declared by the United States District Court for the District of Columbia in *Donnell* v. *United States*. Compliance with the *Donnell* standard implies no judgment by this court that the adoption of that standard was correct. It is adopted here solely because this court considers it unseemly to deviate from that declaration for the limited purposes of the interim plan for this special election. The adoption of this plan is without prejudice to the rights of any party in *Donnell* v. *United States* to pursue that action to finality. If any incumbent supervisor presently a plaintiff in *Donnell* v. *United States* is not reelected in the special election held under this order, he shall nevertheless be entitled to exercise the prerogatives of his former office for the sole purpose of pursuing that litigation to its proper conclusion in behalf of Warren County and at county expense. [Appendix E at 26-7a]

THE QUESTIONS ARE SUBSTANTIAL

I. Conflict with *Beer*

Interspersed with the lower court's findings of fact are certain factors critical to the determination that percentage floors (65% population; 60% VAP) are necessary to provide black voters "with an opportunity to elect a candidate of their choice." [13] These include: a low level of black-voter registration; [14] a review of the low socio-economic position of blacks in

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[13] Appendix A at 9a (par. 37).

[14] *Id.* at 3a (par. 8).

the county, *i.e.*, income, education and employment;[15] a history of discrimination "causing a lesser participation by blacks than whites in the political process";[16] bloc voting;[17] and the fact that no blacks have previously been elected to district office.[18] Presumably armed with the legal authority generated by these factors, the lower court proceeded to scrutinize closely the district lines found in the submission in order to make the following determinations:

(1) That, in addition to incorporating districts that were "not compact," the plan utilized "irregular boundaries" throughout the city of Vicksburg;[19]

(2) That the twenty majority-black census enumeration districts are divided among four of the proposed districts;[20]

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[15] *Id.* (par. 9).

[16] *Id.* at 8a (par. 33). The only evidence cited which bears on the issue are Mississippi statutes and *suits against the state* in the 1960's, *i.e.*, guilt by association. Compare Bolden v. City of Mobile, No. 77-1844 (detailed fact finding in constitutional case).

[17] Appendix A at 9a (pars. 35-6). The appellees' witness on this issue (as well as the 65% business) is Dr. James Loewen, a sociologist who, at $310 per day, is an appendage of the Department. Probable jurisdiction has now been noted in one case in which he played a key role, Rome v. United States, No. 78-1840. On September 25 the Solicitor General filed a jurisdictional statement in United States v. Mississippi, No. 79-504, the state reapportionment suit in which Dr. Loewen was also used as an expert with respect to statewide criteria. If the records in the two cases are reviewed as one, *i.e.*, for purposes of plenary review, it will reveal that appellees in the *Mississippi* case argue that Warren County should be excluded from the 65% requirement while, at the same time, seek to distinguish their position in the instant litigation. See *id.* at 16-7. Accord, Jurisdictional Statement at 17-8, Henry v. Mississippi, No. 79-528.

[18] Appendix A at 8a (par. 34).

[19] *Id.* at 6a (par. 23).

[20] *Id.* (par. 24).

(3) That appellants were aware that the proposed plan divided black population concentrations;[21]

(4) That no "valid nonracial justification" existed for a plan which the court found to "fragment the black community and cause a diminution in black voting strength";[22]

(5) That there had been no showing "that alternative plans [did] not exist which would achieve the same objective and which do not divide black population concentrations . . . ."[23] and

(6) That, in light of the current socio-economic position of blacks, a past history of discrimination, bloc voting, etc., the professional employed to draft the plan was charged with a responsibility to consider "the black population percentage required in a district [65%] to give black citizens *an equal chance* of electing a candidate of their choice."[24]

When packaged, the lower court opinion is nothing less than a major victory for the appellees: *Beer* v. *United States* has been applied (this time in Warren County) and won. Indeed, the parallel between what

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[21] *Id.* at 6a (par. 25). These conclusions dovetail with yet another: irregular shape has a discriminatory effect inasmuch as "black candidates and voters [will suffer] . . . increased campaign costs and confusion." *Id.* at 10a (par. 39).

[22] *Id.* at 10a (par. 41).

[23] *Id.* at 8a (par. 31). The Department and the Lawyers' Committee, although tediously adhering to arguments concerning the shape of the 1978 Plan, have no qualms over the propriety of their own unique configurations which—in turn—generate the 65% level. See, *e.g.*, Map 4 for the "alternative plan" proposed by the Department.

[24] Appendix A at 8a (par. 32). (Emphasis added.)

occurred in *Beer* and what has happened in the instant case is nothing short of incredible.

Employing language essentially identical to that utilized by the Department [25] and adopted by the court below, the Attorney General wrote the following in a letter to New Orleans:

> the boundary lines . . . effect *a dilution of black voting strength* [in that they] combine a number of black voters with a large number of white voters . . . . Moreover, the district lines . . . do not appear to have been based on *a compelling governmental need or to reflect numeric population configurations or considerations of district compactness or regularity of shape.*[26]

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[25] See notes 3-4 and accompanying text, *supra.*

[26] Beer v. United States, 374 F.Supp. 363, 371 n.33 (1974) (Emphasis added.) The approach taken in *Beer* and in the instant case has a long history. Between 1971 and 1975 the Attorney General interposed objections to 51 different redistricting plans in six states. U.S. COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER 402-09 (1975). See also, HUNTER, FEDERAL REVIEW OF VOTING CHANGES: HOW TO USE SECTION 5 OF THE VOTING RIGHTS ACT 90-97 (1974). In objecting to these plans, the Attorney General employed the following standard: district lines must not be drawn in such a way as to divide up a concentration of minority voters and submerge fragments of that concentration in districts with larger numbers of white voters. See TEN YEARS AFTER, *supra,* at 204-49.

The most recent instance was the Department's strict adherence to the "fragmentation" and "dilution" approach in its unsuccessful attack on the redistricting plan proposed by the state of Mississippi. See, *e.g.,* United States, Proposed Conclusions of Law 21, 23, Mississippi v. United States, Civ. Act. No. 78-1425 (districting scheme that "fragments" blacks into white districts violates § 5); *Accord, Id.,* Defendant-Intervenors, Proposed Conclusions of Law at 40 (identical "fragmentation" and "dilution" argument). *Compare* Jurisdictional Statement at 25, United States v. Mississippi, No. 79-504, *with,* Appendix A at 12a (Par. 11) for

Adopting the "compelling interest" approach espoused by the Department, the district court in *Beer* (as did the court below) concluded that the burden on a submitting authority is "at least to demonstrate that nothing but the redistricting proposed" is feasible if a colorable claim of black voter "dilution" is made.[27] Put another way:

> In light of the purposes and legislative history of Section 5 [submitting authorities are] required to establish either that there was no concentration of black voters . . . or that such concentration or concentrations had not been divided among predominantly white districts.[28]

In reaching its conclusion that the New Orleans submission did not pass muster under § 5, the District of Columbia court employed a sweeping constitutional analysis, *i.e.*, total incorporation into § 5 of constitutional, voter-dilution criteria as enunciated in *White* v. *Regester*, 412 U.S. 755 (1973).[29] As such, findings re-

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the proposition that when districts drawn in a manner to meet *Beer* do not concentrate black populations, a discriminatory purpose may be inferred. Similar arguments were made before this Court in *Beer* and rejected, *i.e.*, a remand of the case resulted in no further evidence being taken on the issue prior to dismissal.

[27] 374 F.Supp. at 393. In the New Orleans litigation there were, of course, alternative plans available which would not tend to "dilute" black voters. What was referred to as the "Republican Plan" would have resulted in two districts with black majorities in excess of 60%.See Brief for Appellees-Intervenors, Beer v. United States, 425 U.S. 130 [hereinafter referred to as *Beer* II] at 18. In addition, the NAACP provided a plan which would have produced a 90% district. See *Beer* II, Appendix at 341-42.

[28] Brief for Appellees-Intervenors, *Beer* II at 13 (explaining the impact of the district court's holding).

[29] The status of which is now, at best, questionable. Bolden v. City of Mobile, 571 F.2d 230 (5th Cir. 1978), *prob. jur. noted,*

lated to a past history of discrimination in the voting process,[30] unrelated governmentally-sanctioned discrimination,[31] low registration of minority voters,[32] historic inability to elect minority candidates,[33] unresponsiveness on the part of elected officials to minorities,[34] majority vote, anti-singleshot and bloc voting,[35] were deemed critical ingredients (as they were to the court below) in a determination as to whether § 5 standards were met.

On appeal, Intervenors pointed to what they considered to be a scenario in which blacks in New Orleans had been "systematically dismember[ed]" [36] to wit:

> The [lower court] found that black voters were concentrated in a [sic] east-west belt . . . that that concentration was divided among five different districts and combined with larger numbers of white voters, and the bloc voting by whites rendered unlikely if not impossible the election of black candidates from at least four of the districts.[37]
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> . . . .

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47 U.S.L.W. 3221 (U.S. Oct. 10, 1978), *re-argument ordered*, 47 U.S.L.W. 3741 (U.S. May 1, 1979). The importance of the instant case in light of the Court's review in *Mobile* cannot be underestimated. Expensive and time-consuming constitutional litigation becomes irrelevant if § 5 can be employed (without the need to present live testimony) to reach an identical goal, *i.e.*, forced concentrations of black voting power.

[30] 374 F.Supp. at 395-96.

[31] *Id.*

[32] *Id.* at 397.

[33] *Id.* at 398.

[34] *Id.*

[35] *Id.* at 398-99.

[36] Brief for Appelees-Intervenors, *Beer* II at 17.

[37] *Id.* at 14.

> . . . . Had the district lines been drawn to reflect natural and man-made boundaries which separate the black concentrations from the rest of the city or had the districts merely been reasonably compact, two or more districts with a substantial majority of black voters would have resulted.[38]
>
> . . . .
>
> . . . . [I]t would be difficult to design a districting plan better suited to avoiding a substantial black majority in any one district and thus preventing the election of black candidates.[39]

Paralleling the presentation by Intervenors, the United States canvassed the opinion of the District Court with approval.[40] Arguing that an "unconstitutional dilution" occurs when blacks with "common social and economic interests are divided," [41] the brief supported a full constitutional analysis because

> [a]ny lesser standard for granting a declaratory judgment under Section 5 would permit approval of new election procedures under that section *which would be vulnerable to subsequent challenge under the Fifteenth Amendment—a result obviously contrary to the propylactic purposes of Section 5.*[42]

This Court's approach was, of course, at variance with the District Court's analysis and the arguments made in its support. Noting that the case presented a clear question of statutory, not constitutional law, 425 U.S. at 139, and that § 5's legislative history focused on

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[38] *Id.* at 18.

[39] *Id.* at 20.

[40] Brief for the United States, *Beer* II at 8-9, 15-18, 20-21.

[41] *Id.* at 28.

[42] *Id.* at 18. (Emphasis added.)

the issue of whether minority participation in the political process was "augmented, diminished, or not affected", *id.* at 141, by voting changes, the conclusion followed that:

> [i]n other words, the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise. [*Id.*]

The application of this legal conclusion to the facts was determined to be "straightforward," *i.e.,* a comparison of percentage population and registered-voter figures presented by the "old" and "new" plans in order to make the determination as to whether black voting strength had been enhanced.[43]

Thus, *Beer* stands for the proposition that neither a § 5 court nor the Department of Justice (in administrative preclearance proceedings) has the authority to examine the entire social, economic and political environment of a covered jurisdiction or to scrutinize submissions to ferret out "fragmentation and dilution" of black population concentrations. Even more important, there is nothing in *Beer* which commands that professionals drafting redistricting plans be knowledgeable of those percentages required to give blacks an "equal chance of electing a candidate of their choice" in a par-

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[43] *Id.* at 141-42. "This test [non-retrogression] was satisfied in *Beer* where the reapportionment increased the percentage of districts where members of racial minorities protected by the Act were in the majority." United Jewish Organizations v. Carey, 430 U.S. 144, 159 (1977). *UJO* also established the proposition that § 5 does not have a "prophylatic purpose" and that a constitutional challenge can be made after preclearance.

ticular district nor which permits a § 5 court to conclude that the non-retrogression standard may be equated with current voter-dilution criteria in order to support a judicial fiat that 65% population or 60% VAP's *are required* "to provide black voters with an opportunity to elect a candidate of their choice." The lower-court decision is at war with *Beer* and thus demands plenary consideration by this Court.[44]

II. The Plan

Beer presented this Court with its first opportunity to construe § 5 in the context of an alteration of single-member districts. The test enunciated was deemed satisfied when the reapportionment increased the percentage of districts where members of a racial minority were in the majority. In his dissent, however, Mr. Justice Marshall forewarned that the standard may not always be that easy to apply. As an example he noted that when the size of the majority increases in one district, black voting strength necessarily declines elsewhere.[45] The instant case presents a similar question that finds no clear answer in *Beer*.

First, unlike *Beer*, this case involves a redistricting scheme *totally unrelated* to that which it is intended to supercede. Specifically, eradication of city districts is deemed fundamental to improving the day-to-day functioning of county government. Thus, in drafting the proposed 1978 Plan, the professional employed ini-

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[44] Needless to say, the lower-court's approach is also flatly contrary to the teachings of United Jewish Organizations v. Carey, 430 U.S. 144 (1977), *i.e.*, it is for the State to determine (if it so desires), not the Department of Justice or a § 5 court, what percentage figures are necessary "to ensure the opportunity for the election" of black representatives. *Id.* at 162.

[45] 425 U.S. at 153 n.12. (Marshall, J., dissenting).

tially divided up the county's rural area into five segments designed to equalize road mileage and bridge-maintenance responsibilities. Thereafter, and taking the populations and racial percentages of these districts as given, lines were drawn into the city of Vicksburg in such a manner as to: (1) generate population percentages meeting one-man-one-vote criteria; and (2) contain racial characteristics sufficient to meet the non-retrogression standard of *Beer*. The statistical result of his work, when compared with the 1929 Plan, is easily analyzed.

Under the 1929 Plan, black population percentages in the three severely underpopulated city districts (ranging from 6,217 to 7,500), were 64%, 50% and 56%, whereas the 1978 Plan (with all districts at or near 9,000) produced two 60% districts. As for VAP, the 1929 Plan had two black-majority districts, one with 60.2% and the other with 50.5% in contrast to the 1978 proposal which contains one 57.2% district and another at 58%. The issue, therefore, is not an increase of black-majority districts as in *Beer*. What is involved is an overall upgrading in black voting strength *albeit* the percentage level previously attained (in one district) has been reduced. Indeed, the fact that preclearance of the instant plan was denied by the lower court when a previous three-judge § 5 court (without jurisdiction) concluded that *Beer* had been complied with under a plan with one 60% district and two at the 40% level [46] demonstrates that the case presents an impor-

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[46] See Appendix F at 34a. The three-judge Mississippi court's analysis of the legitimate governmental objectives incorporated into a plan which equalizes road mileage, etc., was also implicitly rejected by the court below. See App. A, pars. 13, 14, 22, 27, 28, 29. As in *Beer*, and all cases of this sort, CPI drafted plans in a manner to insure that dual incumbancy did not occur.

tant issue of statutory construction unresolved by existing precedent. This issue, in and of itself, warrants plenary consideration by the Court.

III. Retention of Jurisdiction

City of Petersburg v. United States, 354 F. Supp. 1021, 1031 (D.D.C.), *aff'd,* 410 U.S. 962 (1973), established the proposition that after preclearance is denied, a § 5 court may *retain jurisdiction* in order to insure that compliance is forthcoming. Prior to July 31, and in light of the fact that a denial of preclearance would leave county government as well as the status of regularly-scheduled elections [47] in a state of total confusion, appellants requested that the lower court's discretion be employed, that is, retaining jurisdiction, requiring submission of a plan complying with the court's decision, and thereafter implementing court-ordered elections.[48] The decision not to grant the motion resulted in a frontal assault by intervenors to force elections under an obviously unconstitutional plan which, in light of steps taken in 1976 to enjoin court ordered elections,[49] could only have been the result of one, singular motivating factor. Specifically, as a beneficiary of the fortuitous fact that a denial of declaratory relief came at the exact time frame elections were regularly scheduled, by forcing elections under any plan (even if unconstitutional) new officials could be elected who would have no

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[47] The "freeze" issue is now before the Court. Rome v. United States, 78-1840.

[48] Inasmuch as the three-judge court for the Southern District had continuing jurisdiction, that entity may have also served as a proper vehicle for ordering elections, *i.e.,* submission of a precleared plan requesting that a schedule for elections be developed.

[49] See p. 8, *infra.*

interest in the plan now before this Court inasmuch as the proposed districts have no relationship with those from which they would be elected. The result: a directive to terminate the instant appeal by the newly-elected officials and resulting mootness.

Thus, county government was subjected to a fifty day period of intensive litigation in state and federal court which only terminated on September 20 with an injunction issued against the 1929 Plan and the development of an "interim" plan for court-ordered elections by the Southern District of Mississippi. All this naturally flowed from the lower court's refusal to retain jurisdiction at a time when the following critical factors were known to the panel:

(1) That other than the 1929 Plan (not used since 1967 and which was obviously unconstitutional), the county had no viable redistricting format under which candidates could run;

(2) That because of the pending case (filed a year and five months previous) the county's election machinery was effectively frozen and the political community was and had been placed on notice of that fact;

(3) That in light of intervenors' express intent to try to force elections under the 1929 Plan there was no question that the county would be placed in political turmoil far more devisive than the polarizing consequences which the litigation had already had on the community;

(4) That appellants' motion for the court to retain jurisdiction and require an immediate submission of a plan conforming to its construction of § 5 was a good-faith attempt to invoke its equitable powers.

What has occurred in this one instance [50] clearly focuses on a question never presented to this Court and which is critical to a proper functioning of § 5: under what circumstances should a § 5 court exercise its equitable discretion in order to expedite preclearance proceedings?

CONCLUSION

What has happened to Warren County is symptomatic of activity by Department lawyers in all covered jurisdictions. For example, attached to Appellants' Motion for Expedited Consideration is a recent editorial from the Wall Street Journal commenting on the fact that elections have been frozen by the Department in Houston and Dallas. The analysis alludes to the exact issue raised by Warren County:

> Since [1975, § 5's] enforcement has gone far beyond an attack on the shabby history of black disenfranchisement to become an "affirmative action" program. . . . The Justice Department has been devoting itself to maximizing the number of minority officeholders, no matter what.

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[50] The advent of the 1980 census coupled with the posture now assumed by the Voting Rights Section towards covered jurisdictions, i.e., promoting rather than protecting black voting rights, would indicate that the District of Columbia court can expect a dramatic increase of § 5 filings.

This Court's decision in *Beer* has had little or no effect on Department policy. The importance of the issues are clear, and appellants respectfully request that this Court note probable jurisdiction and set the case for plenary hearing at the earliest possible time.

Respectfully submitted,

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October, 1979

APPENDIX A

APPENDIX "A"

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-0392

CLYDE R. DONNELL, *et al, Plaintiffs*

v.

UNITED STATES OF AMERICA and GRIFFIN BELL,
Attorney General, *Defendants*

and

EDDIE THOMAS, SR., et al, *Defendant-Intervenors*

Order

Filed July 31, 1979

After careful consideration of the affidavits, exhibits and deposition testimony submitted in this case, the oral arguments of counsel and the entire record herein, and the three-judge court having concluded that plaintiffs have not carried their burden of demonstrating that the proposed redistricting plan does not have the purpose or effect of discriminating on the basis of race, it is by the Court this 31st day of July 1979,

ORDERED that plaintiffs' motion for a declaratory judgment pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1937(c) is hereby denied.

JUDGE ROGER ROBB
JUDGE THOMAS A. FLANNERY

By /s/ JUDGE JUNE L. GREEN
Judge June L. Green
For the Court

[Caption deleted in printing]

This voting rights case came before the Court for oral argument on July 3, 1979. After careful consideration of the submissions of the parties, the oral arguments of counsel at the hearing of this matter, and the entire record herein, the Court concludes that plaintiffs' request for declaratory judgment pursuant to Section 5 must be denied.

Findings of Fact

1. This action was brought by the members of the Warren County Board of Supervisors pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, seeking a declaratory judgment that the proposed 1978 redistricting plan for county supervisor districts does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.

2. Warren County is located in the west central area of the State of Mississippi bordering the Mississippi River. Like all counties in Mississippi, Warren County is divided into five districts for purposes of electing the County Board of Supervisors.

3. The supervisor districts are single-member districts and thus the voters of each district elect one member of the five-member board. In addition, supervisors must be residents of the district which they represent.

4. The Warren County Board of Supervisors has responsibility for establishing the boundaries of the five-county supervisor districts.

5. In 1970, Warren County had a total population of 44,981, of whom 18,355 (40.80%) were black, and a total voting age population of 27,719, of whom 10,574 (38.15%) were black.

6. Vicksburg, Mississippi is the largest city in Warren County. In 1970, Vicksburg, Mississippi had a total popu-

lation of 25,478 of whom 12,568 (49.33%) were black, and a total voting age population of 16,567, of whom 7,483 (45.17%) were black.

7. According to records currently maintained by the Warren County Board of Election Commissioners, the total number of registered voters in the county as of May 6, 1978 was 26,663. The record does not contain the number of registered voters by race as of 1978.

8. As of 1971, the county did maintain registration records which designated the race of most registered voters. Those records show that as of 1971, 58.8% of the registered voters were white and 27.8% were black; the registration cards of the remaining voters (13.4%) did not contain a racial identification.

9. As reflected in 1970 census data, the socio-economic position of blacks in Warren County is substantially lower than white residents. White persons in Warren County have a median income of $9,782.00 while the median income of black persons is $3,794.00; 49% of the black residents have an annual income below the poverty line. The median formal education among black adults (25 years and older) in the county is 7.0 years for males and 8.4 for females. This compares with the median education among white adults which is 10.4 years for males and 10.2 years for females. Finally, 82.0% of blacks are employed in blue collar positions as opposed to 39.8% of white persons in the county.

10. According to the 1970 census, the black population of Warren County is most heavily concentrated in the twenty majority black census enumeration districts in central and north Vicksburg and north of Vicksburg in the rural area. This area includes 68% of the total black population of Warren County and is 71% black in racial composition.

11. The only legally enforceable plan of apportionment for county supervisor elections in Warren County is a plan which was adopted in 1929. Under that plan three of the supervisor districts are located entirely within the City of Vicksburg and the remaining two districts are located in the rural areas of the county. *See* Map, Appendix 1.

12. Under the 1929 plan, the total population and voting age population for each of the five districts are as follows:

Total Population

District	White	Nonwhite	Total	Percent W	Percent NW
1	5934	3893	9827	60.4	39.6
2	2717	4849	7566	36.0	64.0
3	3066	3151	6217	49.3	50.7
4	3321	4218	7539	44.1	55.9
5	11436	2396	13832	82.7	17.3
TOTAL	26474	18507	44981	58.9	41.1

Voting Age Population

District	White	Nonwhite	Total	Percent W	Percent NW
1	3691	2112	5803	63.6	36.4
2	1958	2958	4916	39.8	60.2
3	2318	1965	4283	54.1	45.9
4	2353	2396	4749	49.5	50.5
5	6676	1292	7968	83.8	16.2
TOTAL	16996	10723	27719	61.3	38.7

13. From 1929 to 1970, no changes were made in the boundary lines of supervisor districts and no adjustments were made to equalize population or road mileage among the districts.

14. On November 4, 1970 the Board of Supervisors of Warren County adopted a reapportionment plan for the five supervisor election districts. Unlike the plan in effect

from 1929 to 1970, the 1970 plan had no districts located exclusively within the City of Vicksburg. Rather, each of the five districts encompassed rural county areas as well as a portion of the City of Vicksburg.

15. The 1970 plan was submitted to the Attorney General on November 25, 1970 for review pursuant to Section 5 of the Voting Rights Act of 1965.

16. After obtaining additional population information from Warren County, the Attorney General interposed a timely objection to the proposed plan, pursuant to Section 5, on April 4, 1971.

17. The Attorney General declined to withdraw the objection on August 23, 1971 but the Board held primary and general elections in August and November of 1971, pursuant to the 1970 plan, in spite of the objection by the Attorney General.

18. On October 31, 1973 the Department of Justice filed suit to enjoin the continued use of the 1970 redistricting plan since the plan had been implemented without preclearance under Section 5 of the Voting Rights Act. *United States v. Board of Supervisors of Warren County, Mississippi,* Civil Action No. 73W-48(N) (S.D. Miss.). On June 19, 1975 the three-judge court granted summary judgment in favor of the United States and the 1975 county elections scheduled for August and November were enjoined.

19. Pursuant to the court's order of July 1, 1975 the parties to *United States v. Board of Supervisors of Warren County* filed proposed apportionment plans with the court and on May 13, 1976 the court ordered the county's proposed redistricting plan into effect and established a schedule for county elections.

20. An appeal was taken by the United States and, on February 22, 1977 the United States Supreme Court reversed the judgment of the District Court holding that "only the District Court for the District of Columbia has

jurisdiction to consider the issue of whether a proposed change actually discriminates on account of race and that other district courts may consider Section 5 'coverage' questions." *United States v. Board of Supervisors of Warren County, Mississippi*, 429 U.S. 642, 645 (1977).

21. Following the decision by the Supreme Court the Board of Supervisors through its agent Comprehensive Planners, Inc., of West Point, Mississippi drafted the redistricting plan for Warren County presently before this court for Section 5 review.

22. Unlike the districts under the 1929 plan each of the five districts under the proposed plan divides the City of Vicksburg and encompasses an urban area and a rural area.

23. The districts in the proposed 1978 plan are not compact and follow irregular boundaries through the City of Vicksburg. The northern portion of District 4 is noncontiguous to the remainder of the district; these two portions of the district are connected only by a river bed. *See* Map, Appendix 2.

24. Under the Board of Supervisors' proposed 1978 plan the area encompassed by the twenty majority black census enumeration districts within Warren County is divided among four of the five proposed supervisor districts. In one portion of the plan a one-block area where blacks reside is divided among three districts.

25. Members of the Warren County Board of Supervisors were aware that the proposed 1978 plan divided the black population concentrations within the City of Vicksburg and that the districts as drawn are neither compact nor continguous.

26. Under the proposed 1978 plan, the general population and voting age population for each of the five districts are as follows:

Total Population

White	Nonwhite	Total	Percent W	Percent NW
3509	5494	9003	39.6	61.0
3547	5458	9005	39.4	60.6
5331	3577	8908	58.8	40.2
6904	2152	9056	76.2	23.8
7183	1826	9009	79.7	20.3

Voting Age Population

White	Nonwhite	Total	Percent W	Percent NW
2396	3199	5595	42.8	57.2
2302	3182	5484	42.0	58.0
3412	2018	5430	62.8	37.2
4505	1318	5823	77.4	22.6
4381	1006	5387	81.3	18.7
16996	10723	27719	61.3	38.7

27. The three stated criteria which allegedly guided the drafting of the 1978 proposed plan included: equalization of road and bridge maintenance, equalization of population, and retention of presently existing election districts and availability of voting places.

28. The criteria of equalization of road and bridge maintenance had not been utilized by the Board of Supervisors from 1929 to 1970.

29. The county has no responsibility for road and bridge maintenance in the City of Vicksburg. Therefore equalization of road and bridge maintenance is not a justification for the proposed district lines within the City of Vicksburg.

30. Under the proposed plan no former election precinct within the City of Vicksburg is left intact.

31. Although the 1978 proposed plan achieves the stated objective of equalization of population among the five districts, the plaintiffs have failed to show that alternative plans do not exist which would achieve the same objective and which do not divide black population concentrations within the City of Vicksburg nor reduce black voting strength from the level of the 1929 plan.

32. Mr. Hoyt Holland, the drafter of the 1978 proposed plan, testified that an objective of the plan was to obtain two "substantial" black districts. Mr. Holland was unable to explain what he meant by substantial, and further testified that he was unaware of, and did not consider, the black population precentage required in a district to give black citizens an equal chance of electing a candidate of their choice.

33. Mississippi and Warren County have in the past used such devices as the literacy test, poll tax, and white primary to exclude black citizens from participation in the electoral process. Until passage of the Voting Rights Act of 1965, the use of these racially discriminatory devices effectively excluded black persons in Mississippi and Warren County from exercise of the franchise. Miss. Const. Art. 12, 3244, and as subsequently amended, Miss. Laws, 1954, Ch. 427; Miss. Laws, 1955, Ex. Sess., Ch. 133; *United States v. State of Mississippi,* 229 F. Supp. 952, 989 (S.D. Miss. 1964), (Brown, J. *dissenting*); *United States v. State of Mississippi,* Civil Action No. 3791 (S.D. Miss. 1965); *United States v. State of Mississippi,* Civil Action No. 3312 (S.D. Miss. 1966). Warren County's past history of racial discrimination in voting continues to affect black persons in the county causing a lesser participation by blacks than whites in the political process.

34. Black candidates from Warren County have run for almost all major offices on the county and state level since 1968. Although 40.80% of the population in Warren County is black no black person has ever been elected to a county position.

35. Testimony of expert witnesses and knowledgeable citizens demonstrates that racial bloc voting has consistently prevailed in Warren County and throughout the state of Mississippi.

36. The most recent example of racial bloc voting in a Warren County election took place during a special election in January 1979 for the Mississippi House of Representatives, District 30B. This special election was ordered by the District Court for the Southern District of Mississippi in *Connor, et al, & United States v. Finch,* Civil Action No. 3830(A), and was conducted in a district comprised of six precincts in Warren County with a 59.28% total black population. Although initially receiving a plurality of the votes cast the black candidate, Eddie Thomas Sr., lost to the white candidate in the runoff. Thomas' support came almost exclusively from the Walters and Auditorium precincts, which are predominantly black, while his white opponent carried the remaining precincts by nearly a two-to-one margin.

37. Racial bloc voting combined with Warren County's past history of discrimination and resulting low black voter registration and turnout for elections make it necessary for an electoral district in Warren County to contain a substantial majority of black eligible voters in order to provide black voters with an equal chance to elect a candidate of their choice. It has been generally conceded that, barring exceptional circumstances, a district should contain a black population of at least 65 percent or a black VAP of at least 60 percent to provide black voters with an opportunity to elect a candidate of their choice.

38. Blacks constitute 60% of the voting age population in one district under the 1929 plan and that is the minimum percentage at which black citizens have an equal chance to elect a candidate of their choice. Under the proposed plan no district has a voting age population greater than 58% black and thus, under the proposed plan, it is unlikely that

black citizens will be able to elect a candidate of their choice in any of the districts.

39. The irregularly shaped districts within the city under the proposed 1978 plan will discriminatorily affect black candidates and voters in terms of increased campaign costs and confusion over district boundaries and polling places.

40. Plaintiffs have failed to demonstrate on this record that the proposed plan would not lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.

41. Plaintiffs have offered no valid nonracial justification for the district lines within the City of Vicksburg which result in irregular shaped districts, fragment the black community and cause a diminution in black voting strength.

Conclusions of Law

1. This court has jurisdiction to hear and determine this case. Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c.

2. This court has been properly convened as a court of three judges. Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c.

3. Warren County and the State of Mississippi are subject to the preclearance requirements of Section 5. 30 *Fed. Reg.* 9897 (August 7, 1965).

4. Under Section 5, Warren County, Mississippi may not enforce or implement any change in "any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting" unless such change has either been precleared by the Attorney General, or unless Warren County obtains a declaratory judgment in the United States District Court for the District of Columbia that such change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c.

5. The proposed 1978 redistricting plan enacted by the Warren County Board of Supervisors will occasion voting changes subject to the preclearance requirements of Section 5 of the Voting Rights Act. 42 U.S.C. § 1973c; *Georgia v. United States,* 411 U.S. 526, 531-35 (1973); *Beer v. United States,* 425 U.S. 130, 138 (1976).

6. In an action for declaratory judgment under Section 5, the burden of proof is on the plaintiff. *Georgia v. United States,* 411 U.S. 526, 538 (1973); *South Carolina v. Katzenbach,* 383 U.S. 301, 328 (1966).

7. Plaintiffs' burden in this suit for declaratory relief under Section 5 is to demonstrate that the proposed 1978 redistricting plan does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. 42 U.S.C. § 1973c; *Beer v. United States,* 425 U.S. 130 (1976); *City of Richmond v. United States,* 422 U.S. 358 (1975).

8. Unless the absence of both discriminatory purpose and discriminatory effect is shown, plaintiffs' request for declaratory judgment must be denied. 42 U.S.C. § 1973c; *City of Petersburg v. United States,* 354 F. Supp. 1021 (D.D.C. 1972), *aff'd* 410 U.S. 962 (1973).

9. In order to prove the absence of discriminatory effect, plaintiffs must show that the voting change at issue would not lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise. *Beer v. United States,* 425 U.S. 130, 141 (1976); *State of Mississippi v. United States,* Civil Action No. 78-1425 (June 1, 1979, D.D.C.), Conclusions of Law No. 10.

10. Plaintiffs have failed to show that the proposed plan will not lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise and thus have failed to show the absence of discriminatory effect under the proposed 1978 plan. Therefore, plaintiffs' request for declaratory judgment

must be denied. Findings of Fact No. 23-25, 34-40; *City of Petersburg v. United States,* 354 F. Supp. 1021 (D.D.C. 1972), *aff'd* 410 U.S. 962 (1973); *Beer v. United States,* 425 U.S. 130 (1976).

11. Plaintiffs have failed to offer any justification for the diminution of black voting strength under the proposed plan nor the grossly irregular proposed district boundaries in the City of Vicksburg which fragment black residential areas. Thus, plaintiffs have failed to demonstrate the absence of discriminatory purpose. Findings of Fact No. 23-25, 29-31, 34-38, 40; *City of Richmond v. United States,* 422 U.S. 358 (1975); *City of Petersburg v. United States,* 354 F. Supp. 1021 (D.D.C. 1972), *aff'd* 410 U.S. 962 (1973); *Beer v. United States,* 425 U.S. 130 (1976).

12. Plaintiffs' request for declaratory judgment pursuant to Section 5 of the Voting Rights Act is denied. *Beer v. United States,* 425 U.S. 130 (1976); *City of Petersburg v. United States,* 354 F. Supp. 1021 (D.D.C. 1972), *aff'd* 410 U.S. 962 (1973); *City of Richmond v. United States,* 422 U.S. 358 (1975); *State of Mississippi v. United States,* Civil Action No. 78-1425 (June 1, 1979, D.D.C.).

/s/ ROGER ROBB
Roger Robb, Circuit Judge,
United States Court of Appeals
for the District of Columbia Circuit

/s/ JUNE L. GREEN
June L. Green, Judge
United States District Court
for the District of Columbia

/s/ THOMAS A. FLANNERY
Thomas A. Flannery, Judge
United States District Court
for the District of Columbia

APPENDIX B

APPENDIX "B"

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-392

CLYDE R. DONNELL, et al, *Plaintiffs*

v.

UNITED STATES OF AMERICA, et al, *Defendants*

and

EDDIE THOMAS, SR., et al, *Defendant-Intervenors*

Order

Filed August 23, 1979

Upon consideration of Intervenors' motion for clarification and for declaratory and injunctive relief, the Court declares with respect to Finding No. 11 of the Findings of Fact entered herein on July 31, 1979, that the filing of a section 5 declaratory judgment law suit did not have the effect of "freezing" the election process and that an election should be conducted under the legally enforceable election procedures of 1929, pending preclearance of any new procedures. In all other respects, the Intervenors' motion is denied.

/s/ ROGER ROBB
Roger Robb
U.S. Circuit Judge

/s/ JUNE L. GREEN
June L. Green
U.S. District Judge

/s/ THOMAS A. FLANNERY
Thomas A. Flannery
U.S. District Judge

APPENDIX C

APPENDIX "C"

August 3, 1979

RE: HEARING ON PETITION FOR WRIT OF MANDAMUS IN THE CIRCUIT COURT OF WARREN COUNTY

Judge's Ruling

THE COURT: We are into a position, or a situation, a sort of political fiasco. And, of course, the real loser in this matter is the electorate of Warren County, who's being deprived of their constitutional right, and, as counsel has said, of their privelege to elect officers of their choice. It's really a sad day when the electorate gets caught up in a battle here between—well, we won't say private persons, but public and private persons. Seemingly the rights of the electorate have just been ignored.

They're in Washington and other federal courts, fighting over percentages—three or four or five percent in this district, or it ought to be three or four or five percent more in this district. They're thinking more about the individual rights, I suppose, of the litigants involved than we are about the public in general. Of course this is a matter that has been tossed around and talked about and considered by the community at large. And judges, as well as citizens, can hear what the talk is around the community. And the community wants the right to vote regardless of who they vote for.

Here I see gentlemen who are presently in office; they may be in there on the next vote, or they may not. Who knows? That's according to the whims of the electorate. But there needs to be something done about this matter. Now it occurs to me that it's late in the day for these petitioners now to, after seeking federal relief and after fighting their battles in the federal courts for the last four or five years, and then to seek to get the State court here,

this court, to pull the chestnuts out of the fire. I just think it's a little late in the day, and it comes too late. And in addition to that, I'm not too sure that this court's hands are tied while these matters are pending in the federal court.

Now just an aside and a suggestion of what I think might could be done—but what I think, it may be something that the other court might not think. But it seems to me that the federal court ought to realize the plight of this County, and it ought to be brought into focus some way by counsel for both sides in this litigation, and give the federal court an opportunity to perhaps appoint its own master, as it does in cases. They have a right to appoint a master to look into things, and let the master devise a plan that's going to be satisfactory to the federal court and to the Attorney General of the United States and the Justice Department. And that's what it looks like. Now to keep on going, this thing could be interminable. Warren County could employ another one of these comprehensive planners out of Dallas or Tishomingo or Indianapolis. They can come down here and devise what they think is a pretty solid plan and try to piece it out geographically and otherwise. And yet, who's to say but what we get into the same litigation and same difficulty on any plan that's submitted.

So the only thing I see to do, the federal court is the one, apparently who has the last say about it, and they write in here this plan is unacceptable. Seems to me, in the interest of justice and these people here, and these litigants, that they should appoint their own master as they call it, or comprehensive planner, and get one that's satisfactory to the court and get things moving here toward our right to franchise again.

As I say, evoking [sic] the aid of this court at this late date and, also, with the matter still in a pending situation before the federal court, I would not be inclined to entertain this petition for mandamus and, therefore, the petition for writ of mandamus will be dismissed.

I will ask counsel for the respondents in the case to prepare an order for dismissal of the petition.

* * * *

[Court Reporter's Certificate deleted in printing]

APPENDIX D

APPENDIX "D"

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION No. J79-0425(c)

Herbert C. Stokes, Jr., Doris Erwin Sanders, Rembert C. Webb, Jr., William Sheffield, Paul Sheffield, and Marshall E. Calhoun, *Plaintiffs*

vs.

Warren County Election Commission, Mary Nancy Burkhardt, Chairman, Challie Turnstall, Lena Corbin, Lucille Lovett, Clint Whitaker and George Culkin, *Defendants*

and

Eddie Thomas, Tommie Lee Williams, and Charlie Hunt, *Intervenors*

Findings of Fact, Conclusions of Law and Order Granting Temporary Restraining Order

On August 30, 1979, Plaintiffs initiated this action by filing a complaint seeking a preliminary injunction. On the same day plaintiffs moved the court to enter a temporary restraining order. On August 31, 1979, Eddie Thomas, et al., moved for leave to intervene. On August 31 also, counsel for all parties and movants for intervention appeared before the Honorable William Harold Cox, who then set the cause for hearing on Tuesday, September 4, 1979, on the motion to intervene and for appropriate further consideration.

On September 4, 1979, the hearing set by Judge Cox was held before the undersigned United States Circuit Judge sitting as a District Judge by designation. At the commencement of this hearing, the motion to intervene was granted. There followed a full adversary hearing which

developed the factual background of prior elections in supervisors' districts in Warren County and the feasability of holding a general election in said county on November 6, 1979, using 1929 beat lines. In that hearing two witnesses were introduced by Plaintiffs and five witnesses were introduced by Intervenors. Counsel for all parties participated in examination of witnesses and oral argument. No party advised the court of any problems as to absent witnesses or unavailable proof, nor did any party request a recess or continuance.

The Court having considered the amended complaint herein, the evidence adduced during the aforementioned hearing, and having heard oral argument of counsel, hereby makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. Plaintiffs, registered voters of Warren County, Mississippi, seek a temporary restraining order or preliminary injunction prohibiting Defendants from conducting elections pursuant to the 1929 County Districting Plan, which defendants are now threatening to hold in November 1979.

2. Several attempts have been made by the Board of Supervisors of Warren County to redistrict the county to comply with the United States Supreme Court rulings relative to the one-man, one-vote 14th Amendment requirements and the Voting Rights Act of 1965. The latest attempt is a 1978 Plan. On July 31, 1979, a three-judge court for the District Court of the District of Columbia ruled the Board had failed to sustain the burden of proof imposed of Section 5 of the Voting Rights Act of 1965, in *Donnell v. United States*, Civil Action No. 78-0392, and therefore denied declaratory relief allowing use of the 1978 Plan. The *Donnell* decision is now on appeal to the United States Supreme Court.

3. In the course of announcing the decision on *Donnell*, the three-judge court concluded that the only legally en-

forceable plan of apportionment for county supervisor elections in Warren County under Section 5 is a plan which was adopted in 1929.

4. By order filed August 23, 1979, upon consideration of Intervenors' motion for clarification and for declaratory and injunctive relief, the three-judge District Court in *Donnell* declared that "an election should be held in Warren County under the legally enforceable election procedures of 1929, pending preclearance of any new procedure." Defendants have announced that they will hold a general election on November 6, 1979, using the supervisors' districts established in the 1929 Plan.

5. Under the 1929 Plan, the five districts of Warren County contain the following populations, according to the 1970 census:

District One	9,827
District Two	7,566
District Three	6,217
District Four	7,539
District Five	13,832

6. The equities which this Court has considered in the exercise of its injunctive powers are as follows:

a. The people of Warren County are entitled to exercise their right of suffrage to elect supervisors' districts officeholders, which has been denied since 1975.

b. Compliance with the 14th Amendment equal protection requirements ensuring each voter has an equal voice in elections is of equal dignity;

c. A decision by the United States Supreme Court in *Donnell* should be forthcoming in the near future; and

d. The 1980 census may require further reapportionment action by Warren County within the next year

7. While an order barring elections under the 1929 Redistricting Plan denies the people of Warren County the right of suffrage, substantially more harm would be incurred if these elections were allowed to be held. An injunction is necessary to the orderly administration of justice.

8. Preparations for the conduct of a general election in Warren County using the long-discarded 1929 beat lines would have to begin immediately. Witnesses indicated they might not be complete by November 6, 1979. Substantial expenditures of public funds would occur before a hearing on a preliminary injunction could be held. Immediate prohibition of this needless expense would be in Plaintiffs' interest and in the public interest also.

At the commencement of the proceedings on September 4, 1979, the Court advised that the hearing concerned a request for injunctive relief from the threatened general election on November 6, 1979, under the 1929 Plan. At the conclusion of the hearing on September 4, 1979, the Court announced its findings and stated that an order granting injunctive relief would be entered. Inquiry was made of the parties as to whether the form of the order should be a Temporary Restraining Order or a Preliminary Injunction. The parties were unable to agree. Plaintiffs and Defendants maintain that they were proceeding pursuant to their agreement, reached before intervention was allowed, to hear the matter on preliminary injunction. Intervenors state that they had no notice that the proceedings were to be other than a hearing on a temporary restraining order.

10. Rather than resolve the conflict, the Court will grant a Temporary Restraining Order and set this matter for further hearing on Preliminary Injunctive relief on September 14, 1979, at 9:00 a.m.

Conclusions of Law

1. This Court has jurisdiction over this action under 28 U.S.C. § 1343(3).

2. In accordance with the dictates of *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court must exercise its discretion in ruling on a motion for preliminary injunction based upon the equities involved and the applicable law.

3. The 1929 Apportionment Plan for Warren County violates the one-man, one-vote requirements of the 14th Amendment, and any elections held pursuant to the 1929 Plan would be unconstitutional.

4. The three-judge District Court in *Donnell* did not adjudicate the 1929 Plan to be valid under the 14th Amendment. Rather, it was implemented solely because it was the latest apportionment plan utilized in Warren County prior to November 1, 1964, the commencement date for plan preclearance under the Voting Rights Act.

5. The judicial authority of the District Court in *Donnell* was derived solely from Section 5 of the Voting Rights Act of 1965, a 15th Amendment statute. Therefore, the *Donnell* Court has no jurisdiction to consider, and did not consider, the 14th Amendment attack upon the 1929 Plan advanced in this litigation.

6. Because the 1929 Plan is patently violative of the 14th Amendment, Plaintiffs would suffer irreparable injury if the threatened general election is held using its beat boundaries. Neither Defendants nor Intervenors will suffer harm from halting the holding of an unconstitutional election.

Temporary Restraining Order

Based upon the foregoing findings and conclusions, Defendant members of the Warren County Election Commission and the Circuit Clerk of Warren County, and each and all of them, their agents, servants, employees, attorneys, and successors in office, who receive actual notice of this order by personal service or otherwise, be and they are hereby temporarily enjoined pending further order of this Court from holding elections in Warren County, Mississippi, on November 6, 1979, based upon the supervisors' districts designated in the 1929 Plan of apportionment of Warren County, Mississippi. This order shall expire on September 14, 1979, the parties having agreed to its issuance for this period of time.

This the 7th day of September 1979, at 4:10 o'clock p.m.

/s/ Charles Clark
United States Circuit Judge
sitting as District Judge by
designation

APPENDIX E

APPENDIX "E"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION No. J79-0425(c)

HERBERT C. STOKES, JR., DORIS ERWIN SANDERS, REMBERT C. WEBB, JR., WILLIAM SHEFFIELD, PAUL SHEFFIELD, and MARSHALL E. CALHOUN, *Plaintiffs*

vs.

WARREN COUNTY ELECTION COMMISSION, Mary Nancy Burkhardt, Chairman; Challie Turnstall; Lena Corbin; Lucille Lovett; Clint Whitaker; and GEORGE CULKIN, Circuit Clerk, *Defendants*

and

EDDIE THOMAS, TOMMIE LEE WILLIAMS, and CHARLIE HUNT; BOARD OF SUPERVISORS OF WARREN COUNTY, Clyde R. Donnell, Herbert Boler, Thomas F. Akers, Paul Pride, and James Andrews, *Intervenor-Defendants*

UNITED STATES OF AMERICA, *Amicus Curiae*

Findings of Fact, Conclusions of Law and Preliminary Injunction

Filed September 20, 1979

The findings of fact and conclusions of law in this order are based on evidence adduced at the hearing on preliminary injunction held on September 14, 1979, and at the initial hearing in this case on September 4, 1979. All findings of fact and conclusions of law contained in the court's Temporary Restraining Order dated September 7, 1979, are incorporated in this order.

To afford the people of Warren County the right of suffrage to elect supervisors' district officeholders and to comply with fourteenth amendment equal protection requirements, the court must promulgate an interim plan of its own governing the holding of a special election in Warren County, Mississippi, for the offices of that county elected by supervisor beats. The imminence of the general election to be held on November 6, 1979, and the accomplishment of those details necessary to permit the orderly holding of the required special election in districts different from those previously used will not allow the scheduling of this special election to coincide with the regular general election. However, those elected will be able to take office at the time terms begin for officials regularly elected in 1979.

A special election under this court's interim plan which protects fourteenth and fifteenth amendment rights, but does not prejudice the litigation position of the parties in this suit in *Donnell v. United States*, Civil Action No. 78-0392, United States District Court for the District of Columbia (appeal presently pending in the Supreme Court of the United States), is necessary to prevent irreparable injury, is in the public interest, and is demanded by a balance of equities.

The plan of redistricting supervisors' districts in Warren County, Mississippi, for this special election, which the court adopts as Part I hereof, complies with fourteenth amendment one-man, one-vote considerations. It also meets the racial standards declared by the United States District Court for the District of Columbia in *Donnell v. United States*. Compliance with the *Donnell* standard implies no judgment by this court that the adoption of that standard was correct. It is adopted here solely because this court considers it unseemly to deviate from that declaration for the limited purposes of the interim plan for this special election. The adoption of this plan is without prejudice to the rights of any party in *Donnell v. United States* to pursue that action to finality. If any incumbent supervisor

presently a plaintiff in *Donnell v. United States* is not reelected in the special election held under this order, he shall nevertheless be entitled to exercise the prerogatives of his former office for the sole purpose of pursuing that litigation to its proper conclusion in behalf of Warren County and at county expense.

The district boundary lines adopted by the court are designed to achieve the following population and racial distribution:

	Population	Total Nonwhite (%)	% Nonwhite VAP	Deviation
District 1	9068	3061(33.75%)	31.30%	+0.80%
District 2	9160	5982(65.30%)	62.74%	+1.82%
District 3	9075	6086(67.06%)	64.55%	+0.87%
District 4	8824	1878(21.28%)	19.47%	-1.91%
District 5	8854	1500(16.94%)	15.47%	-1.57%
TOTALS	44,981	18,507(40.14%)	38.47%	±3.73%

Although the court considers it undesirable to create a supervisor's district entirely within the city limits of a municipality, time and research resources did not permit the accomplishment of this and the more fundamental objectives for this special election. The lines do have the virtue of closely approximating the district boundary lines utilized by the County Election Commission in the preparation of its present poll books.

It Is Ordered that Mary Nancy Burkhardt, Challie Turnstall, Lena Corbin, Lucille Lovett, and Clint Whitaker, as members of the Warren County Election Commission; George Culkin, as Circuit Clerk; and Clyde R. Donnell, Herbert Boler, Thomas F. Akers, Paul Pride, and James Andrews, as members of the Warren County Board of Supervisors, and each and all of them, their agents, servants, employees, attorneys, and successors in office, who receive actual notice of this order by personal service or otherwise, be and they are hereby enjoined pending further

order of this court from holding elections in Warren County, Mississippi, on November 6, 1979, for offices based upon the supervisors' districts designated in the 1929 Plan of apportionment of Warren County, Mississippi. It is further ordered that the persons specified above shall, forthwith, begin preparations for and hold an election in accordance with Parts I and II hereof and shall observe the caveat stated above as to the pursuit of litigation in *Donnell v. United States* to finality.

I.

The special election required in Part II hereof shall be conducted and held utilizing supervisors' district lines located as specified in Exhibit A.

II.

While this special election should conform as nearly as possible to Mississippi law, time and expense factors prohibit reliance on all of those procedures. Therefore, it is ordered that the following processes and schedule be followed in holding this special election:

The Election Commission and the Circuit Clerk shall forthwith commence the task of conforming the poll books to the new district lines provided in Part I and shall complete the revisions as promptly as possible, but in any event within five weeks from the date of this order. *See* Miss. Code Ann. § 23-5-11 (1972). The Warren County Election Commission shall proceed immediately to make any changes in location of, or additions to, polling places which they deem necessary or desirable to facilitate voting under the plan adopted today and should publish these changes or additions in the notices required to be published by this order. Within ten days following the date of this order, the Election Commission shall commence the publication, in a newspaper of general circulation in Warren County, of notice of the special election and the newly drawn district boundaries, which publication shall continue at least

once each week for three consecutive weeks. If the Election Commission should determine that maps would more effectively communicate the boundary line locations to the public, maps may be substituted for or used to supplement the description contained in Part I. This same notice shall also be posted during the period of newspaper publication on the public bulletin board maintained at the Warren County courthouse. Twenty-one days from the date of first publication and posting, the same shall be complete. Within 14 days after publication is complete, qualified electors desiring to be candidates shall file qualifying petitions and affidavits and pay appropriate assessments as hereinafter particularized. *Cf. id.* § 23-5-19. Petitions shall include 50 signatures of registered electors residing in the candidate's district and shall be filed with the Circuit Clerk. *Cf. id.* § 23-5-3. Although Mississippi law only applies the 50-signature petition requirement to election commission candidates, the court considers that, absent a party primary, the requirement of these petitioning signatures is appropriate for all offices involved. The Corrupt Practices Act affidavit required by state law shall also be filed within this 14-day period with the Circuit Clerk. *See id.* § 23-3-3 through -7. The assessments provided for in Miss. Code Ann. § 23-1-33(c) and (e) shall be paid by each candidate for any office covered hereby to the County Election Commission within the same 14 days. *See id.* § 23-1-35. Any candidates who have previously qualified for any office to be elected on the basis of supervisor districts in the 1929 Plan of apportionment must requalify under this interim plan. However, any fee or assessment which such a candidate was required to pay to qualify for election under the 1929 Plan should be credited toward any fee or assessment he must pay to qualify under this interim plan. Upon the expiration of the 14-day period, the Circuit Clerk shall turn over the petitions and affidavits to the Election Commission. Within seven days of the receipt of these items, the Election Commission shall verify each petition, affidavit,

the payment of the required fee or assessment, and the statutory qualification of each candidate for the office petitioned for, and certify the list of qualified candidates. *See id.* § 23-5-197.

The election shall be held on Tuesday, November 27, 1979. Ballots will be printed and distributed and the election conducted in accordance with all provisions of Mississippi law not inconsistent with this order. *See id.* § 23-5-99 through -169. If no candidate receives a majority of votes in that election, the names of the two candidates having the highest number of votes shall be resubmitted to the voters in a runoff balloting to be held two weeks after the first balloting. *Id.* § 23-5-303. All candidates receiving a majority of votes shall be declared elected.

The term of office covered by this procedure shall begin on the first Monday of January 1980, concurrently with other county officer terms, and shall extend until their successors are duly elected under Mississippi law. This is an interim procedure for this special election only. Subsequent regular elections in these or other lawfully redrawn districts will be conducted in accordance with Mississippi law. In the event that Warren County receives clearance of a redistricting plan for supervisors' districts under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973(c), whether in *Donnell v. United States* or by other means, they may apply to this court for such further equitable relief as is warranted at that time.

All questions related to the allowance of attorneys' fees under 42 U.S.C. § 1988, are reserved for later decision.

ORDERED, this 20th day of September 1979.

/s/ CHARLES CLARK
United States Circuit Judge
sitting as District Judge by
designation

APPENDIX "F"

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

CIVIL ACTION No. 73W-48(N)

UNITED STATES OF AMERICA, *Plaintiff*

v.

THE BOARD OF SUPERVISORS OF WARREN COUNTY, MISSISSIPPI, et al., *Defendants*

Findings of Fact, Conclusions of Law and Mandatory Injunction Directing Election

Filed May 13, 1976

A hearing was held in the above-named matter on April 29, 1976. After consideration of the evidence presented at that hearing, the arguments of counsel and the submitted briefs, the court adopts the apportionment plan submitted by the Warren County Board of Supervisors and directs that a new election process to fill the offices affected should be promptly held.

I. Apportionment

At the outset of this hearing the court was presented with three apportionment plans: two by the Government and one by the Warren County Board of Supervisors. The court did not consider itself bound to choose between these three plans but proceeded on the premise that if Fourteenth and Fifteenth Amendment protections had not been accorded by any plan proposed, the court could have instituted its own plan or modified any of the three plans submitted. The court did, however, conclude from the face of

the plans that only Plan 2 submitted by the Government should be considered.[1]

The plan submitted by Warren County Board of Supervisors was drawn taking into consideration *only* five elements: (1) road mileage, (2) population, (3) land area, (4) existing voting precincts, and (5) 1970 U.S. census enumeration district boundaries within the city. The Board of Supervisors' expert witness testified that the racial makeup of the city and the county was not considered during the drafting of the original Board of Supervisors' plan. On the other hand, this same expert testified that Plan 2 submitted by the Government appeared to have been constructed so as to maximize black voting strength in at least one of the five districts. On cross examination, the witness admitted he had no knowledge of the Government's actual intent in fixing the configuration of the districts, but was relying solely upon the placement of district boundary lines and his analysis of the racial effect of such placement.

The Government assailed the Board of Supervisors' plan on three grounds: (A) it is deficient in the one-man, one-vote concept; (B) it has diluted black voting strength; and (C) there should be no substantial consideration given to the equalization of road mileage. The court considered all three attacks before deciding to accept this plan.

A. One-Man, One-Vote

Chapman v. Meier, 95 S.Ct. 751 (1975), requires that court-ordered apportionment plans not allow a significant

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[1] At the court's direction, the Government's Plan 1 was not the subject of any evidence taken during this hearing. This plan drew two districts entirely within the city limits of Vicksburg. Because of the substantial county responsibilities of the Board of Supervisors, the court determined that the parties should concentrate their proof on Government Plan 2 and the Board of Supervisors' plan, in both of which all proposed districts embraced urban and rural areas. Neither party objected to this procedure.

variation from the ideal population size of each district. The overall variation in predicted voting age population in the Board of Supervisors' plan is ± 7.3%. Although this is a larger variation than is included in either of the Government plans, it is in the order of only 200 to 300 predicted potential voters in the district with the largest variance. The court concludes that this is not significant enough to require the modification of this plan. All three plans are drawn with census figures now 6 years old. Although this appears to be the best information available, the estimated voting age population projection could contain numerical errors of a substantial order. In addition, this minor variation in projected voters derives some justification from the attempt of this plan to balance other considerations including road mileage and total area.

B. Dilution

The Government argues that *Beer v. United States,* 44 U.S.L.W. 4435 (U.C. March 30, 1976), would condemn as retrogressive the adoption of a plan that reduces the number of districts containing black voting age majorities. The Government points out that the invalid apportionment plan now in effect in Warren County includes three districts with majority black population—two of which contain black voting age population majorities of 60.2% and 50.5%.[2] The plan suggested by the Warren County Board of Supervisors provides for only one district with a majority black voting age population. The Government claims the adoption of this plan would be *per se* retrogressive and, therefore, its adoption is proscribed by *Beer. Beer,* however, is distinguishable. It involves § 5 of the Voting Rights Act and relies on the language of that statute for its holding.

More significantly, the court does not consider the plan it adopts to violate the spirit of *Beer.* Obviously the dis-

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[2] Five tenth of one percent in this district equates with less than 25 people.

tricts as now laid out must be reapportioned to meet one-man, one-vote requirements. Such reapportionment plans, however, cannot include districts which have been gerrymandered either to maximize or to minimize the racial composition of a particular district. Gilbert v. Sterret, 509 F.2d 1389, 1394 (5th Cir. 1975); Turner v. McKeithen, 490 F.2d 191, 197 (5th Cir. 1973). In redistricting to equalize numbers of voters, other considerations, such as equalization of road mileage and area, were appropriately integrated in producing the district lines as drawn. The results are not significantly dilutive of black voting strength. Under the plan adopted, blacks in Warren County will have a 60% total population majority in one of the five districts and a population minority of over 40% in two others. The majority district will have a majority black voting age population and in the other two districts the black voting age population will approximately 40%. The Board's plan originally was drawn without regard to race. In future general elections where there might be three candidates (Democrat, Republican, Independent), blacks would have a realistic opportunity of electing representatives from three districts with their plurality strength. The court determines this plan to be fair for both Fourteenth and Fifteenth Amendment purposes. It will not lessen the opportunity of black citizens of Warren County to participate in the political process and elect officials of their choice.

C. Equalization of Road Mileage

We reject the Government's argument that road mileage equalization should be a *de minimis* consideration in the drawing of this reapportionment plan. *Howard v. Adams County Board of Supervisors*, 453 F.2d 455 (5th Cir. 1972), recognized the equalization of road mileage as a legitimate consideration.

The Government argues, however, that since road mileage has not been equalized in Warren County for approximately the past 50 years, it should not now be a legitimate consideration. If this intends to urge that the errors of past officials in failing to seek equalization bind the present citizens by waiver or estoppel, it is not well taken. Any court apportionment plan should take into consideration every factor which will make county government in Warren County operate efficiently. The equalization of road mileage will substantially contribute to that efficiency since one of the major duties of the Board of Supervisors is to care for county roads.

SUMMARY

It is the opinion of this court that the plan submitted by the Warren County Board of Supervisors neither dilutes black voting strength nor is deficient in one-man, one-vote considerations. The plan will provide the most efficient operation of the county government in Warren County. For these reasons, this court adopts the apportionment plan submitted by the Warren County Board of Supervisors.

II. Election

The existing members of the Board of Supervisors, justices of the peace, and constables of Warren County are holdovers. It is imperative that the right of the people of Warren County to elect officials of their choice not be further delayed. The time and expense involved in conducting an election under the processes provided for by Mississippi law prohibit reliance on all of those procedures. To this end, we order that elections be held according to the following process and schedule:

Upon this order becoming final, the election commission shall direct the Circuit Clerk to conform the poll books to the new district lines within 3 weeks. *See* Miss. Code Ann. § 23-5-11 (1972). After the poll books have been corrected,

the Election Commission shall publish in a newspaper of general circulation in Warren County, for 3 consecutive weeks, notice of the upcoming election and the newly drawn districts. *See id.* § 19-3-1. This same notice shall be posted for the same period of time on the public bulletin board maintained at the Warren County courthouse. Upon completion of the period of publication and posting, which shall occur 21 days from the date of first publication and posting, candidates shall have 30 days in which to file qualifying petitions and affidavits and pay appropriate assessments as hereinafter particularized. *Cf. id.* § 23-5-19. Petitions shall include 50 signatures of registered electors residing in the candidate's district and shall be filed with the Circuit Clerk. *Cf. id.* § 23-5-3. Although Mississippi law only applies to 50-signature petition requirement to Election Commission candidates the court considers that, absent a party primary, the requirement of these petitioning signatures is appropriate for all offices involved. The Corrupt Practices Act affidavit required by state law shall also be filed within this 30-day period with the Circuit Clerk. *See id.* § 23-3-3 through -7. The assessments provided for in Miss. Code Ann. § 23-1-33(d) and (e) shall be paid by each candidate for any office covered hereby to the County Election Commission within the same 30 days. *See id.* § 23-1-35. Upon the expiration of this 30-day period, the Circuit Clerk shall turn over the petitions and affidavits to the Election Commission. Within 10 days of the receipt of these items, the Election Commission shall verify each petition, affidavit, the filing of the required fee, and the statutory qualifications of each candidate for the office petitioned for, and certify the list of qualified candidates. *See id.* § 23-5-197.

The election shall be held as soon thereafter as procedures required will reasonably permit. Ballots will be printed and distributed and the election conducted in accordance with all provisions of Mississippi law not inconsistent with this order. *See id.* § 23-5-99 through -169. If no candidate receives a majority of votes in that election, the names of the two candidates having the highest number of votes shall be resubmitted to the voters in a runoff balloting 2 weeks after the first balloting. *Id.* § 23-5-303. All candidates receiving a majority of votes shall be declared elected.

The term of office covered by this procedure shall begin 30 days after the runoff election and shall extend until the next regularly elected officials take office. This is a one-time procedure only. Subsequent regular elections in these districts will be conducted in accordance with Mississippi law. Any of the time periods discussed herein may be extended up to a maximum of 3 weeks to enable the special election or runoff to coincide with any regularly scheduled county-wide election.

This the 13 day of May 1976.

/s/ CHARLES CLARK
United States Circuit Judge

/s/ D. WM. MCPRESSELY, JR.
United States District Judge

/s/ WALTER S. NIXON, JR.
United States District Judge

APPENDIX G

APPENDIX "G"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION No. 78-0392

CLYDE R. DONNELL, et al., *Plaintiffs,*

v.

UNITED STATES OF AMERICA, and
GRIFFIN BELL, Attorney General, *Defendants,*

and

EDDIE THOMAS, SR., et al., *Defendant-Intervenors*

Notice of Appeal to the Supreme Court of the United States

Notice is hereby given that Plaintiffs, Clyde R. Donnell, et al., hereby appeal to the Supreme Court of the United States from the final order entered on July 31, 1979, denying Plaintiffs' Motion for Declaratory Relief.

This appeal is taken pursuant to 42 U.S.C. 1973b and 42 U.S.C. 1973c.

/s/ GREER S. GOLDMAN
John W. Prewitt
George C. Cochran
Greer S. Goldman
Counsel for Plaintiffs

[Certificate of Service deleted in printing]

OVERSIZE FOLDOUT(S) FOUND HERE IN THE PRINTED EDITION OF THIS VOLUME ARE FOUND FOLLOWING THE LAST PAGE OF TEXT IN THIS MICROFICHE EDITION

SEE FOLDOUT NO. 1, 2, 3, 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-555

CLYDE R. DONNELL, et al., *Appellants*

v.

UNITED STATES, et al., *Appellees*

&

EDDIE THOMAS, SR., et al., *Intervenors*

On Appeal from the United States District Court for the District of Columbia

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SUPPLEMENT TO JURISDICTIONAL STATEMENT

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October, 1979

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-555

CLYDE R. DONNELL, HERBERT BOLER, THOMAS F. AKINS, PAUL PRIDE, JAMES ANDREWS, *Appellants,*

v.

UNITED STATES AND BENJAMIN CIVILETTI, ATTORNEY GENERAL, *Appellees,*

&

EDDIE THOMAS, SR. et al., *Intervenors.*

On Appeal from the United States District Court for the District of Columbia

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SUPPLEMENT TO JURISDICTIONAL STATEMENT

Reproduction of Map 3 in the Jurisdictional Statement fails to clearly delineate the proposed district lines at issue as they come into the City of Vicksburg. Attached to this Supplemental Memorandum are the lines in question with areas of alleged fragmentation (as seen by the Department).

Respectfully Submitted,

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University, MS 38655

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1050 Seventeenth Street
Washington, D.C.

JOHN W. PREWITT
P.O. Drawer 750
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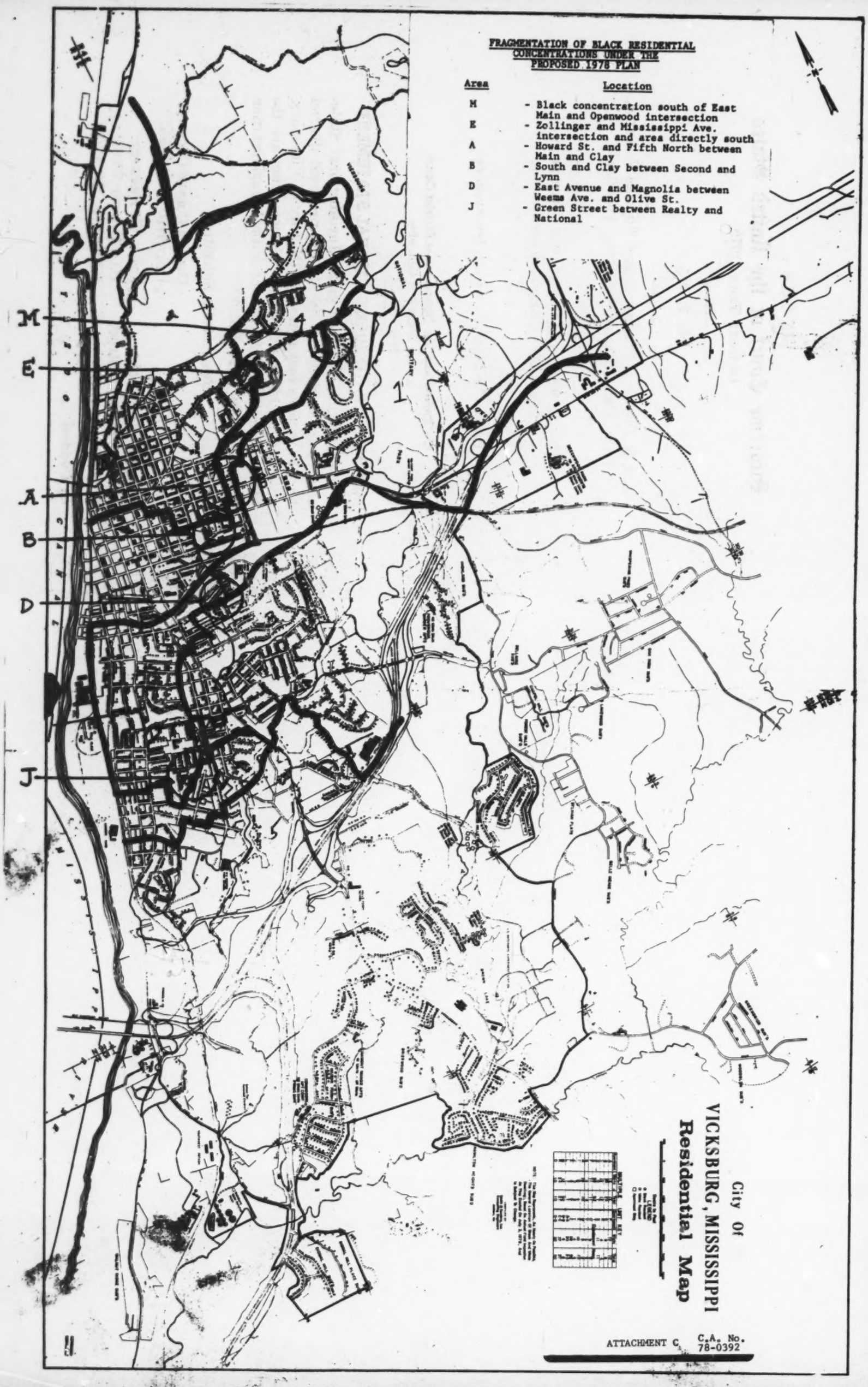
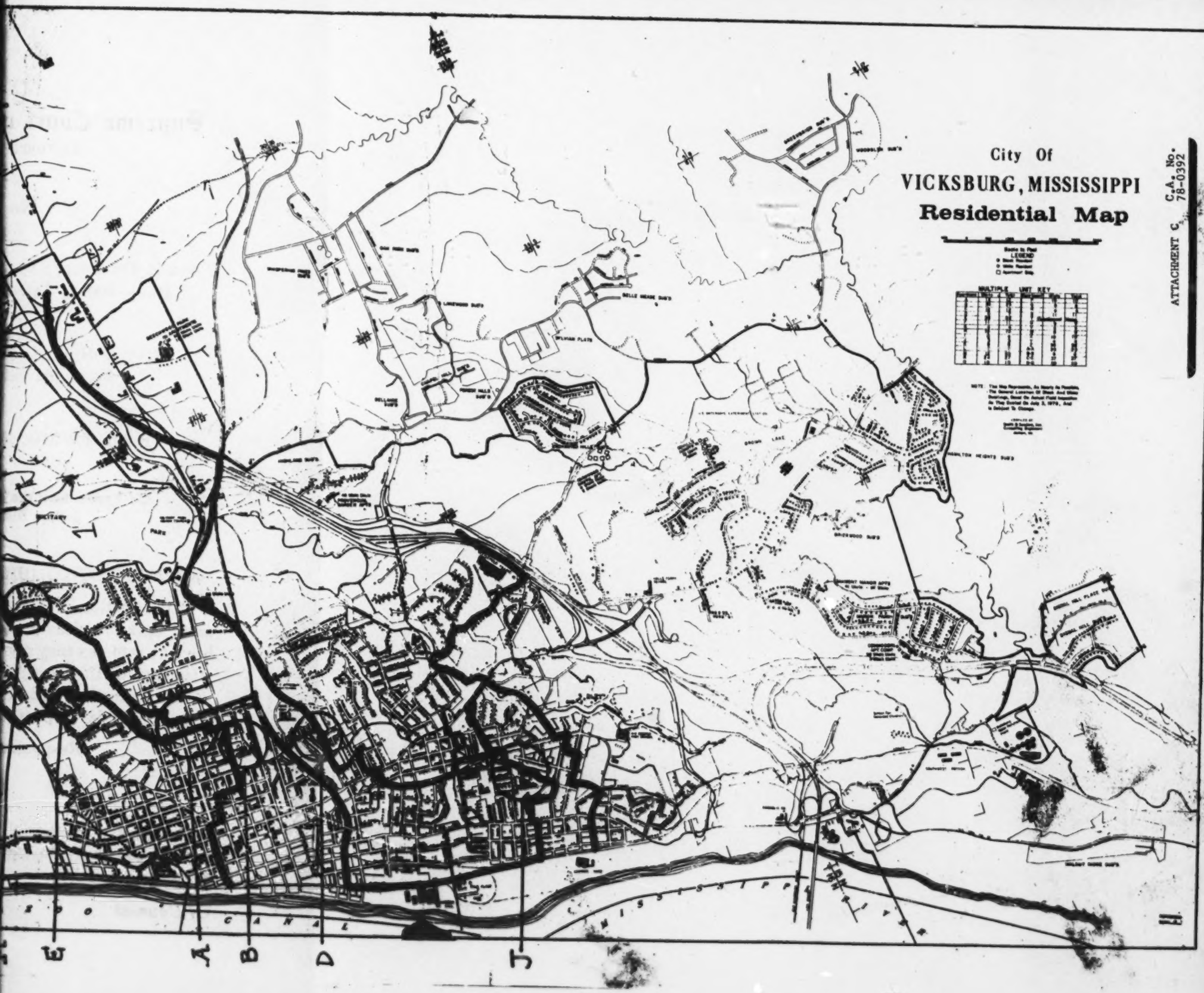
Of Counsel


FRAGMENTATION OF BLACK RESIDENTIAL CONCENTRATIONS UNDER THE PROPOSED 1976 PLAN
Area
Location
M - Black concentration south of East Main and Openwood intersection
E - Zollinger and Mississippi Ave. intersection and area directly south
A - Howard St. and Fifth North between Main and Clay
B - South and Clay between Second and Lynn
D - East Avenue and Magnolia between Weems Ave. and Olive St.
J - Green Street between Realty and National
M
E
A
B
D
J
City Of
VICKSBURG, MISSISSIPPI
Residential Map
ATTACHMENT C
C.A. No. 78-0392


City Of
VICKSBURG, MISSISSIPPI
Residential Map
ATTACHMENT C
C.A. No. 78-0392
LEGEND
MULTIPLE UNIT KEY
E
A
B
D
J
H

No. 79-555

In the Supreme Court of the United States

OCTOBER TERM, 1979

CLYDE R. DONNELL, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION OF THE UNITED STATES TO AFFIRM

WADE H. MCCREE, JR.
Solicitor General

DREW S. DAYS, III
Assistant Attorney General

JESSICA DUNSAY SILVER
DAVID B. MARBLESTONE
Attorneys
Department of Justice
Washington, D.C. 20530

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Cases:

Statute:

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-555

CLYDE R. DONNELL, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION OF THE UNITED STATES TO AFFIRM

Pursuant to Rule 16 of the Rules of this Court, the United States moves that the judgment of the district court be affirmed.

OPINION BELOW

The opinion of the district court (J.S. App. 2a-12a) has not been reported.

JURISDICTION

The order of the three-judge district court was issued on July 31, 1979 (J.S. App. 1a). The no-

tice of appeal was filed on August 6, 1979 (J.S. 2; J.S. App. 39a). The jurisdictional statement was filed on October 4, 1979. The jurisdiction of this Court is invoked under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c.

STATUTE INVOLVED

Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, provides in pertinent part:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any * * * standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964 * * *, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such * * * standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, * * * and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such * * * standard, practice, or procedure: *Provided*, That such * * * standard, practice, or procedure may be enforced without such proceeding if * * * [it] has been submitted by the chief legal officer * * * of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission * * *.

QUESTIONS PRESENTED

1. Whether the district court erred in holding that appellants failed to establish that their proposed redistricting plan did not have the purpose, and would not have the effect, of abridging the right to vote on account of race.

2. Whether the district court erred in declining to retain jurisdiction over this case.

STATEMENT

1. Appellants, the members of the Board of Supervisors of Warren County, Mississippi, brought this action under Section 5 of the Voting Rights Act to obtain a declaratory judgment that a proposed redistricting plan for the county's five supervisor districts "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" (J.S. App. 2a). That proposed plan was one of several with which appellants sought to replace a districting plan adopted for Warren County in 1929. The 1929 plan was used until 1971 (J.S. App. 4a); but by 1970, population shifts had produced substantial malapportionment among its districts.

In 1970, the Board of Supervisors adopted a reapportionment plan and, pursuant to Section 5, submitted it to the Attorney General for preclearance (J.S. App. 4a-5a). Despite the fact that the Attorney General objected to the 1970 plan, elections were held in 1971 on the basis of that plan (J.S.

App. 5a). In 1973, the Attorney General brought an action in the United States District Court for the Southern District of Mississippi (the "Mississippi court") to enjoin further use, in violation of Section 5, of the 1970 plan (J.S. App. 5a). In 1975, the three-judge Mississippi court granted summary judgment in favor of the United States and enjoined the holding of elections on the regularly scheduled dates in 1975 (J.S. App. 5a).[1] In 1976, the Mississippi court ordered into effect a redistricting plan proposed by the county (*ibid.*). The United States appealed the latter order, and this Court reversed, holding that, in issuing that order, the Mississippi court had exceeded the jurisdiction conferred on it by Section 5. *United States* v. *Board of Supervisors*, 429 U.S. 642 (1977).

In 1978, the Board of Supervisors adopted a new redistricting plan and, without submitting the plan to the Attorney General, commenced the present action in the United States District Court for the District of Columbia seeking preclearance.

2. On July 31, 1979, the district court entered its order denying preclearance (J.S. App. 1a). In a preclearance action under Section 5, the jurisdiction seeking a declaratory judgment has the burden of establishing the absence of both discriminatory purpose and discriminatory effect. See, *e.g.*, *South Carolina* v. *Katzenbach*, 383 U.S. 301, 335 (1966). In the

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[1] No Board of Supervisors election was held in Warren County in 1975.

present case, the district court concluded that appellants failed to make either showing.

The court concluded that the absence of a discriminatory effect was not established because appellants failed to show that the plan would not lead to a retrogression in the position of blacks "with respect to their effective exercise of the electoral franchise" (J.S. App. 11a, quoting *Beer* v. *United States*, 425 U.S. 130, 141 (1976)). The court's conclusion regarding retrogression was based upon its finding that, in contrast to the pre-existing 1929 plan, the proposed plan contained no district in which blacks had an equal chance to elect a candidate of their choice (J.S. App. 9a-10a). The 1929 plan included one such district—that is, a district in which blacks constituted a sufficiently large percentage of the voting-age population (60%) that, despite the residual effects of past discrimination on black political participation, blacks had as great a chance as whites to elect a candidate of their choice (J.S. App. 9a).[2]

Because appellants had not justified the diminution of black voting strength under the proposed plan or the "grossly irregular proposed district boundaries in the City of Vicksburg which fragment black resi-

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[2] Under the 1929 plan, blacks constituted the following percentages of the voting-age population of the five districts (J.S. App. 4a): (1) 36.4, (2) 60.2, (3) 45.9, (4) 50.5, and (5) 16.2.

Under the proposed 1978 plan, blacks constituted the following percentages of the voting-age population (J.S. App. 7a): (1) 57.2, (2) 58.0, (3) 37.2, (4) 22.6, and (5) 18.7.

dential areas," the district court found that appellants had also failed to demonstrate the absence of discriminatory purpose (J.S. App. 12a).

Accordingly, the request of appellants for a declaratory judgment was denied.[3]

3. On August 30, 1979, seven white residents of Warren County brought an action in the United States District Court for the Southern District of Mississippi to enjoin the Warren County Election Commission from holding an election on the basis of the 1929 plan. *Stokes* v. *Warren County Election Commission*, Civ. Action No. J79-0425(c) (J.S. App. 19a). Black residents intervened, as did the members of the Board of Supervisors (appellants in the present case). On September 7, that court issued a temporary restraining order barring the use of the 1929 plan (J.S. App. 24a); and on September 20, it issued an order adopting an interim districting plan and directing the county to hold a special election, under the interim plan, on November 27, 1979 (J.S. App. 25a).[4]

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[3] Several black residents of Warren County intervened in this action. After the July 31, 1979, order was issued, they filed a motion for clarification of the order and for other relief. On August 23, the district court entered an order stating, in part, that "an election should be conducted under the * * * [1929 plan], pending preclearance of any new procedures" (J.S. App. 13a).

[4] The Board of Supervisors has appealed to the United States Court of Appeals for the Fifth Circuit. *Stokes* v. *Warren County Election Commission*, No. 79-3388. The Board moved for a stay of the order in *Stokes* pending the decision

ARGUMENT

There are two independent bases for the decision of the district court—the failure of the appellants to show the absence of discriminatory effect and their failure to show the absence of discriminatory purpose. The court found that the loss of a district in which blacks had an equal chance of electing a candidate of their choice amounted to a retrogression under this Court's decision in *Beer* v. *United States*, 425 U.S. 130 (1976). With regard to purpose, the district court found that the Board had failed to carry its burden because it offered no valid non-racial explanation for the irregular districts that fragmented the black population of Vicksburg and resulted in a retrogression in black voting strength. The district court's conclusions reflect the application of settled law to factual findings that are fully supported by the record. The decision presents no issue requiring plenary consideration by this Court.

1. The district court, in applying the retrogression test of *Beer*, compared the proposed 1978 plan with the 1929 plan (J.S. App. 4a). Under the 1929 plan, the two districts with the largest proportion of blacks have voting-age populations that are 60.2% and 50.5% black. Under the 1978 plan, two districts

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of this Court in the present case. On October 15, 1979, that motion was denied by the court of appeals.

The Board then filed in this Court an application for stay of the mandate of the district court in *Stokes*. On October 26, 1979, Mr. Justice Powell denied the request for a stay, *sub nom. Donnell* v. *Thomas*, No. A-352.

are predominantly black, having voting-age populations that are 57.2% and 58% black.

The black voting-age population increased in one district and decreased in another under the 1978 plan; but because of the percentages involved, the district court concluded that the plan as a whole was retrogressive. Specifically, the court concluded that, in contrast to the 1929 plan, "under the proposed plan, it is unlikely that black citizens will be able to elect a candidate of their choice in any of the districts" (J.S. App. 9a-10a). This finding was based upon particular characteristics of Warren County elections (J.S. App. 9a):

> Racial bloc voting combined with Warren County's past history of discrimination and resulting low black voter registration and turnout for elections make it necessary for an electoral district in Warren County to contain a substantial majority of black eligible voters in order to provide black voters with an equal chance to elect a candidate of their choice. It has been generally conceded that, barring exceptional circumstances, a district should contain a black population of at least 65 percent or a black VAP [voting-age population] of at least 60 percent to provide black voters with an opportunity to elect a candidate of their choice.[5]

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[5] Appellants contend that it was improper for the district court to consider the evidence upon which this finding is based (J.S. 20-21), but they do not challenge directly the validity of the finding.

The decrease in the black voting-age population (from 60.2% to 58%) in one district under the 1978 plan, as compared with the preexisting 1929 plan, was thus not offset by the increase in the black voting-age population (from 50.5% to 57.2%) in another district. For the net result was the loss of the only district in which blacks had an equal chance of electing a candidate of their choice.[6] The court thus properly concluded that appellants had failed to show that the proposed plan would not lead to retrogression in the position of blacks (J.S. App. 11a).

2. Appellants assert (J.S. 13-21) a conflict between the decision below and this Court's ruling in *Beer* v. *United States*, *supra*. But there is no basis for that claim. On the contrary, the district court applied the *Beer* retrogression test and, for the reasons outlined above, did so correctly. It reached a result different from the result in *Beer* because the

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[6] Appellants appear to suggest (J.S. 14 n.17) that the position taken by the United States (and accepted by the district court) in the present case is inconsistent with views expressed in our jurisdictional statement in *United States* v. *State of Mississippi*, No. 79-504. We there argued (J.S. 16-17) that the district court had applied the 60% breakpoint too rigidly, by failing to acknowledge that, with a majority of the voting-age population, blacks have at least *some* possibility of electing a candidate of their choice, but that, with less than a majority, blacks have no such possibility. There is no inconsistency between that position and our view that, in order to have an *equal* chance of electing a candidate of their choice, blacks in Warren County must constitute 60% of a district's voting-age population.

facts of this case differ significantly from those of *Beer*.[7]

It is said (J.S. 20) that under *Beer*, the district court in an action for preclearance of a reapportionment plan may compare data on total population and registered voters, but lacks authority "to examine the entire social, economic and political environment of a covered jurisdiction or to scrutinize submissions to ferret out 'fragmentation and dilution' of black population concentrations." This narrow reading of *Beer* is unwarranted. Retrogression is measured by the effect of a change upon "the position of racial minorities with respect to their effective exercise of the electoral franchise." 425 U.S. at 141. The meaning of "effective exercise" will vary from case to case, and it necessarily involves an examination of the particular circumstances bearing on political participation.

In the present case, the proposed reapportionment plan would result in a decrease in black voting-age population in one district and an increase in another

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[7] In *Beer*, this Court compared the proposed apportionment plan for electing members of the New Orleans City Council with the existing plan and found that the proposed plan enhanced the position of blacks with respect to effective exercise of the franchise. This conclusion was based upon the fact that, under the proposed plan, blacks would constitute (1) a majority of the population in two districts and (2) a clear majority of the registered voters in one district. Under the existing plan, there was no district in which blacks were a clear majority of the registered voters and only one district in which blacks constituted a majority of the population. 425 U.S. at 141-142.

district. In evaluating the significance of such a change, the district court properly considered not only those basic statistics,[8] but also their context. That includes such matters as the history of political participation by blacks in Warren County, the effects of past discrimination, the results in county elections, and the relative rates of voter registration and voter turnout for blacks and whites. In this way, the district court was able to assess the effect of the proposed plan on the effective exercise by blacks of the franchise.

3. As a second ground for its denial of a declaratory judgment preclearing the 1978 plan, the district court held that appellants had failed to demonstrate the absence of discriminatory purpose (J.S. App. 12a). This holding was based on the Court's determination that appellants had failed to justify either "the diminution of black voting strength under the proposed plan" or "the grossly irregular proposed district boundaries in the City of Vicksburg which fragment black residential areas" (*ibid.*).

The court accurately observed that the districts in the 1978 plan are not compact, and that they follow irregular boundaries through the City of Vicksburg (J.S. App. 6a). For example, District 4 consists of two virtually noncontiguous portions joined by a narrow stretch of river bed (*ibid.*). Within Vicks-

[8] It is by no means clear that the appellants are correct in assuming that, if the evidence were limited to the statistics, the appellants would meet their burden of establishing the absence of discriminatory effect.

burg, a narrow corridor of District 4, a predominantly white district, cuts through a black residential area, fragmenting it among three districts.[9] Indeed, a single block where blacks reside is divided among the three districts (J.S. App. 6a).

It was incumbent upon appellants to justify these and other aspects of their plan and to prove the absence of discriminatory purpose. None of the asserted criteria for the drafting of the 1978 plan—equalization of road and bridge maintenance, equalization of population, retention of existing election districts, or availability of polling places—adequately explained the district lines within the City of Vicksburg. The district court noted, for example, that equalization of road and bridge maintenance is not a justification for the proposed lines within Vicksburg, because the county does not maintain bridges or roads within the city (J.S. App. 7a).

The 1978 plan did achieve equalization of population among the districts, but appellants failed to show that there were no alternatives that would achieve that objective without severely fragmenting black population concentrations in Vicksburg (J.S. App. 8a). Regarding the stated criterion of retaining existing election districts, the district court found that the proposed plan did not leave intact any of the former precincts within Vicksburg (J.S. App. 7a).

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[9] See the map contained in the supplement to the jurisdictional statement.

Having found that appellants had "offered no valid nonracial justification for the district lines within the City of Vicksburg which result in irregular shaped districts, fragment the black community and cause a diminution in black voting strength" (J.S. App. 10a), the district court properly concluded that appellants had not met their burden on the question of discriminatory purpose.

4. The final issue [10] relates to the decision of the district court not to retain jurisdiction after its denial of a declaratory judgment.[11] Appellants cite *City*

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[10] In their jurisdictional statement (page 3), appellants list as one of the questions presented the issue of the constitutionality of Section 5. They do not, however, address this issue in their argument. Moreover, this issue was not raised by appellants in the district court and is not discussed in the district court's opinion. Accordingly, it is not properly before the Court in this case.

In any event, as noted in *Beer, supra*, 425 U.S. at 133, the constitutionality of Section 5 was upheld in *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966). The position of the United States is fully set forth in our brief in *City of Rome* v. *United States*, No. 78-1840. We are sending appellants a copy of that brief.

[11] On July 31, 1979, appellants filed a motion in the district court requesting that its decision regarding preclearance be issued as soon as possible. In addition, appellants requested that, if the district court were to deny preclearance, the court retain jurisdiction and establish an expedited schedule for submission of a new apportionment plan. On the same day, the decision of the district court was issued.

In support of their July 31 motion, appellants filed a memorandum urging the district court, in the event that it denied preclearance, to enjoin the holding of elections (under the

of Petersburg v. *United States*, 354 F. Supp. 1021, 1031 (D.D.C. 1972), aff'd, 410 U.S. 962 (1973), in which, after denying preclearance of a proposed annexation, the district court retained jurisdiction and directed the city to prepare a city-council election plan complying with the Voting Rights Act.[12]

Under Section 5, the obligation to obtain preclearance is placed upon the covered states and political subdivisions. The role of the United States District Court for the District of Columbia is to determine whether to issue a declaratory judgment of preclearance. Ordinarily, upon the granting or denying of such a motion, the court's task is concluded. At most, the question of retaining jurisdiction "in order to expedite preclearance proceedings" (J.S. 25) is a matter within the district court's discretion. Appellants have not shown that, in declining to retain jurisdiction and to enjoin the holding of elections under the 1929 plan,[13] the district court exercised its discretion improperly.

Insofar as appellants sought to expedite the submission of a new apportionment plan, their motion

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1929 plan), pending submission of a new plan complying with the court's interpretation of Section 5.

As noted above, on August 30, in response to a motion by the intervenors in this case, the district court entered an order of clarification stating that an election should be conducted under the 1929 plan, "pending preclearance of any new procedures" (J.S. App. 13a).

[12] See the discussion of *Petersburg* in *City of Richmond* v. *United States*, 422 U.S. 358, 370 (1975).

[13] See note 11, *supra*.

was unnecessary. The denial of preclearance for one plan in no way limited the power of the Board of Supervisors to adopt and to seek preclearance for a new plan. The Board could, at any time, have adopted a new plan and could have asked that it be considered by the same three-judge court.

To the extent that appellants sought to enjoin use of the 1929 plan, their motion is moot. The related lawsuit in the Mississippi court, *Stokes* v. *Warren County Election Commission*, *supra*, resulted in a temporary restraining order against use of the 1929 plan (J.S. App. 24a) and then an order adopting an interim plan and requiring a special election under the interim plan (J.S. App. 25a).[14]

CONCLUSION

The judgment of the district court should be affirmed.

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NOVEMBER 1979

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[14] It should be noted that the September 20, 1979, order of the *Stokes* court adopting an interim plan includes the following (J.S. App. 30a): "In the event that Warren County receives clearance of a redistricting plan * * * under Section 5 * * * whether in *Donnell* v. *United States* or by other means, they may apply to this court for * * * equitable relief * * *."

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Appellees

On Appeal from the United States District Court for the District of Columbia

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MOTION TO AFFIRM OF PRIVATE APPELLEES, EDDIE THOMAS, SR., ET AL.

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On Appeal from the United States District Court for the District of Columbia

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MOTION TO AFFIRM OF PRIVATE APPELLEES, EDDIE THOMAS, SR., ET AL.

The private appellees, Eddie Thomas, Sr., Charlie Steele, Frank H. Summers, St. Clair Mitchell, Mrs. Charlie Hunt, Tommie Lee Williams, and Willie Jordan, black voters of Warren County, Mississippi, move the Court pursuant to Rule 16 of the Rules of the Supreme Court of the United States to affirm the final judgment of the District Court on the ground that the questions presented are so unsubstantial as not to warrant further argument.

STATEMENT

This is a direct appeal from the opinion and final judgment of the three-judge District Court for the District of Columbia convened pursuant to § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. The District Court held that the appellant members of the Warren County, Mississippi, Board of Supervisors—plaintiffs below—had failed to prove that their proposed 1978 county redistricting plan does not have the purpose and would not have the effect of denying or abridging the right to vote on account of race or color and denied their prayer for a declaratory judgment under § 5. In rejecting the Board's plan, the District Court found that the proposed plan unnecessarily divided the black population concentration in Warren County among four irregularly shaped districts (J.S., App. A, p. 6a), that the Board members knew that the proposed plan split up black population concentrations and that the districts were neither compact nor contiguous (*id.*), that there were alternatives to this fragmentation (*id.*, p. 8a), that the Board had offered "no valid nonracial justification" for the dilution of black voting strength within the City of Vicksburg (*id.*, p. 10a), and that the proposed districts reduced the black percentages of existing districts to the point that it was "unlikely that black citizens will be able to elect a candidate of their choice in any of the districts" (*id.*, pp. 9a-10a). On these findings, which are amply supported by the record and not challenged as clearly erroneous in this appeal, the judgment of the District Court should be affirmed.

A. Prior Proceedings

This action is a continuation of the efforts of the all-white Warren County Board of Supervisors, in a county which is 41% black, to maintain all-white county government, to exclude any opportunities for black representation, and to maintain themselves in office through re-

peated racial gerrymandering of county supervisors' district lines and blatant disregard of the requirements of § 5 of the Voting Rights Act.

Warren County is located in west central Mississippi on the Mississippi River. The county governing board is the Board of Supervisors; each of the five members is elected from one of five supervisors' districts to four-year terms of office. Supervisors' districts also serve as election districts for justice court judges, constables, and, beginning in 1980, members of the county board of election commissioners.

Warren County, like most Mississippi counties, has an extensive history of racial discrimination affecting the right to vote. Literacy tests, the poll tax, and the white primary prior to the passage of the Voting Rights Act effectively excluded black persons in Mississippi and Warren County from the exercise of the franchise (J.S., App. A, p. 8a). This past history of racial discrimination continues to cause a lesser participation by blacks than whites in the political process (*id.*), as reflected by disproportionately lower black registration (*id.*, p. 3a). Racial bloc voting also consistently prevails in Warren County elections (*id.*, p. 9a).

Warren County has not had lawful county-district elections [1] since 1967 as a result of the continuing efforts of the all-white Board of Supervisors to gerrymander black voting strength and flagrantly to disregard their clear obligations under § 5 of the Voting Rights Act. The 1971 district elections were held under a county redistricting plan objected to by the United States Attorney General under § 5 of the Voting Rights Act, and the 1975 district elections were never held.

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[1] "County-district" elections is the Mississippi statutory term for election of county officers from the respective supervisors districts, sometimes referred to as "beats."

Prior to the first recent redistricting in 1970, Warren County had three majority black districts which were 64.0%, 55.9% and 50.7% nonwhite in population, all located within the City of Vicksburg, the county seat (*id.*, p. 4a).[2] Two of the districts had nonwhite voting age population majorities of 60.2% (District 2) and 50.5% (District 4) (*id.*). This districting had been in effect from 1929 to 1970 (*id.*). In 1970, the Board adopted a new county redistricting plan (hereinafter the 1970 plan), which split up the three majority black districts in Vicksburg—where most of the black population is concentrated—and reduced the number of majority black districts to two districts with slight black population majorities of only 56.6% and 51.0%.[3] The 1970 plan was submitted by the Board to the United States Attorney General for the required § 5 preclearance, additional information was requested and submitted, and on April 4, 1971 the Attorney General entered an objection to the plan finding that discrepancies between the population figures submitted by the Board's planning agent, Comprehensive Planners, Inc. (CPI), and 1970 Census data made it impossible for the Department of Justice to determine that the plan would not have a racially discriminatory effect.[4] Subsequently, the Board submitted additional statistical information to the Department of Justice, but the Department found the additional data subject to "the same infirmities" present in the

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[2] A map showing the district boundaries of the pre-1970 plan, sometimes referred to as the "1929 plan," is attached to the Jurisdictional Statement as Map 1. The boundaries of the three majority black districts within Vicksburg—Districts 2, 3 and 4—were extremely compact and contiguous.

[3] Intervenors' First Req. for Admissions, ¶¶ 10, 12.

[4] Letter from Jerris Leonard, Asst. Attorney General, Civil Rights Division, U.S. Dept. of Justice to Landman Teller, attorney for the Warren County Bd. of Supervisors, April 4, 1971.

original data, and declined on August 23, 1971 to withdraw the objection.[5]

Despite the Attorney General's express § 5 objection to the 1970 plan, and his express refusal to withdraw that objection, the Board of Supervisors illegally and wrongfully in violation of § 5 conducted the 1971 August primaries and November general election on the basis of the objected-to 1970 plan. *United States* v. *Board of Supervisors of Warren County, Mississippi*, 429 U.S. 642, 643 (1977). Two black supervisor candidates in the two marginally black districts were soundly defeated by white opponents.[6]

Subsequently, the Board submitted supplemental data on its 1970 plan to the Department of Justice, and on February 13, 1973 the Attorney General determined on the basis of the additional information that

> "the effect of the proposed district boundary lines is to fragment areas of black population concentrations, thereby minimizing the total number of black persons residing in each of the districts and diluting black voting strength in Warren County.
>
> Moreover, it does not appear that the district lines are drawn as they are because of any compelling governmental need and they do not reflect population concentrations in the county or considerations of district compactness of regularity of shape. Under these circumstances, we find no basis for withdrawing the objections to the implementation of this redistricting plan interposed by our letter of April 4, 1971." [7]

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[5] Letter from David Norman, Asst. Attorney General, Civil Rights Division, U.C. Dept. of Justice to Teller, August 23, 1971.

[6] Intervenors' First Req. for Admission, ¶ 14.

[7] Letter from J. Stanley Pottinger, Asst. Attorney General, Civil Rights Division, U.S. Dept. of Justice to John W. Prewitt, attorney for the Warren County Bd. of Supervisors, February 13, 1973.

On March 7, 1973, the Department of Justice restated its position with regard to the 1970 plan, and noted that "because the objectionable redistricting plan was legally unenforceable at the time the 1971 county supervisor elections were held, those elections were unlawful." [8]

On October 31, 1973, the United States filed an action in the District Court for the Southern District of Mississippi to enforce the Attorney General's § 5 objection to the 1970 plan, *United States* v. *Board of Supervisors of Warren County, Mississippi*, Civil No. 73W-48(N), and a three-judge District Court was convened (J.S., App. A, p. 5a). On June 19, 1975, the District Court granted summary judgment in favor of the United States and enjoined the 1975 county-district elections (*id.*). The District Court then ordered submission of new county redistricting plans, and when the Attorney General objected to the Board's new proposed 1976 plan for dilution of black voting strength (J.S. p. 7), the District Court itself on May 13, 1976, approved and ordered into effect the Board's new 1976 plan and established a schedule for the postponed county-district elections (*id.*).

On appeal to this Court, in which some of the appellees here were permitted to appear as amicus curiae, this Court by a unanimous vote summarily reversed the judgment of the Mississippi District Court and held that it "twice exceeded the permissible scope of its § 5 inquiry," which was "limited to the determination whether 'a [voting] requirement is covered by § 5 but has not been subjected to the required federal scrutiny.'" *United States* v. *Board of Supervisors of Warren County, Mississippi*, 429 U.S. 642, 645-46 (1977). The District Court erred both in enjoining the holding of the 1975 county-district elections for violations of the Fourteenth and Fifteenth Amendments and in approving the Board's new

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[8] Letter from Pottinger to Prewitt, March 7, 1973.

plan under the Fifteenth Amendment and ordering it into effect. *Id.*[9]

The postponed 1975 county-district elections have never been held. The illegally-elected, all-white Board of Supervisors remains in office today, and it is their new 1978 plan which is the subject of this proceeding.

B. Proceedings Below

Following the 1977 decision of this Court, the Warren County Board of Supervisors instructed the planning firm which had drafted its 1970 and 1976 plans, Comprehensive Planners, Inc., to prepare a new county redistricting plan (J.S., App. A, p. 6a). Instead of submitting the new 1978 plan to the Attorney General for § 5 review, the members of the Board on March 6, 1978 filed this action in the District Court for the District of Columbia seeking a § 5 declaratory judgment that their 1978 plan "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color," 42 U.S.C. § 1973c. The defendants are the United States and the Attorney General. The private appellees, Eddie Thomas, Sr., et al., who are seven black citizens and registered voters of Warren County adversely affected by the Board's proposed plan, were granted leave to intervene on June 15, 1978.

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[9] In ordering the Board's plan into effect, the Mississippi District Court made certain findings which appellants in their Jurisdictional Statement here extensively quote and upon which they rely (J.S., pp. 7-8, 22) and which are attached as an appendix to their Jurisdictional Statement (Appendix F). Because that court's May 13, 1976 decision—upon which appellants rely—was summarily reversed by this Court on jurisdictional grounds, appellants' reliance on those findings flagrantly transgresses the bounds of proper argument and should be completely disregarded by this Court. Of course, in holding that the Mississippi District Court lacked jurisdiction to approve the Board's plan, this Court did not reach the merits of that plan.

After extensive discovery, and oral argument on the entire record, the District Court on July 31, 1979 entered its findings of fact and conclusions of law and denied plaintiffs' request for a declaratory judgment. The District Court found that the black population of Warren County is most heavily concentrated in 20 majority black Census enumeration districts in central and north Vicksburg and north of Vicksburg in the rural area; this area includes 68% of the total black population of the county and is 71% black in racial composition (J.S., App. A, p. 3a). Under the proposed plan, this heavy black population concentration is dispersed among four of the five proposed districts; at one point a one-block black residential area is divided among three districts (*id.*, p. 6a). Unlike the 1929 plan—which was the existing plan—all five districts take in both rural and urban area and divide the City of Vicksburg among all five districts (*id.*).[10] The proposed districts "are not compact and follow irregular boundaries through the City of Vicksburg," and one portion of proposed District 4 is noncontiguous with the rest of the district (*id.*).

The proposed plan reduces the number of majority black districts from three to two, and substantially reduces the black population percentages of the existing majority black districts. District 2 is reduced from 64.0% nonwhite in population to 60.6% nonwhite; Dis-

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[10] A map showing the boundaries of the proposed county redistricting plan is attached to the Jurisdictional Statement as Map 3. On this map the majority black Census enumeration districts of Warren County are shaded in gray. This map graphically shows that the proposed plan creates five oddly shaped districts which extend from the far corners of the county in long, narrow corridors into the City of Vicksburg (in the west central portion of the county), where 68% of the black population is concentrated, fragmenting this black population concentration among four districts (District 1, 2, 3, and 4). District 4, which stretches from the extreme south-western part of the county into northeast Vicksburg, closely resembles the prehistoric dinosaur, Tyrannosaurus Rex.

trict 3 is reduced from 50.7% nonwhite to 40.2% nonwhite; and District 4 is reduced from 55.9% nonwhite to 23.8% nonwhite (*id.*, pp. 4a, 7a). The black percentage of District 1 is increased from 39.6% nonwhite to 61.0% nonwhite (*id.*). Although under the existing plan District 2 was 60.2% nonwhite in voting age population, none of the proposed districts attain this percentage. District 1 is only 57.2% nonwhite in voting age population, and the nonwhite voting age population of District 2 is reduced to 58%. (*id.*)

The District Court found that "Warren County's past history of racial discrimination in voting continues to affect black persons in the county causing a lesser participation by blacks than whites in the political process" (*id.*, p. 8a), that the socio-economic position of blacks in Warren County is substantially lower than white residents (*id.*, p. 3a), that blacks suffer from disproportionately lower voter registration than whites (*id.*), and that racial bloc voting has consistently prevailed and continues to prevail in Warren County elections (*id.*, p. 9a). As a result of these factors, an election district must be at least 60% black in voting age population to enable black citizens to have an equal chance to elect candidates of their choice (*id.*, p. 9a). Under the existing plan, District 2 was 60.2% black in voting age population; however, under the proposed plan "no district has a voting age population greater than 58% black and thus, under the proposed plan, it is unlikely that black citizens will be able to elect a candidate of their choice in any of the districts" (*id.*, pp. 9a-10a).

The District Court also found that the members of the Board of Supervisors were aware that the boundary lines of the proposed plan divided the black population concentrations within Vicksburg, and that the districts as drawn were neither compact nor contiguous (*id.*, p. 6a). Plaintiffs failed to show that there were no alternatives which

would have equalized the population among the districts without splitting up black population concentrations or reducing black voting strength (*id.*, p. 8a), and offered "no valid nonracial justification for the district lines within the City of Vicksburg which result in irregularly shaped districts, fragment the black community and cause a diminution in black voting strength" (*id.*, p. 10a). The three stated criteria for the proposed plan were: equalization of road and bridge maintenance, equalization of population, and retention of presently existing election districts and availability of voting places (*id.*, p. 7a). Pursuit of these criteria failed to justify the proposed plan, however. Equalization of road and bridge maintenance was a brand new criterion; it had not been utilized from 1929 to 1970 (*id.*). Further, the county has no responsibility for road and bridge maintenance in the City of Vicksburg; therefore "equalization of road and bridge maintenance is not a justification for the proposed district lines within the City of Vicksburg" (*id.*). Also, none of the presently existing election precincts within the City of Vicksburg are left intact in the proposed plan (*id.*)

On these findings, which are not challenged in this appeal, the District Court held that the plaintiffs had failed to show the absence of a discriminatory purpose or effect and—pursuant to this Court's decision in *Beer* v. *United States*, 425 U.S. 130 (1976)—failed to show that the proposed plan would not lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise (*id.*, pp. 11a-12a).

Plaintiffs filed their notice of appeal on August 6, 1979. Their motion to expedite this appeal was denied by the Court on October 15.

C. Subsequent Proceedings

Prior to and following the District Court's judgment, the Warren County Board of Supervisors made every effort completely to halt the electoral processes and suspend democratic government in Warren County. On or before June 8, the statutory qualifying deadline for party primary candidates,[11] six blacks and four whites qualified with the Warren County Democratic Executive Committee to run for county-district offices in the August 7 Democratic primary under the pre-1970 plan, which—in the absence of § 5 preclearance of the Board's 1978 plan —constituted the existing county districting plan (J.S., App. A, p. 4a). The Board immediately took steps to stop the 1979 county-district elections from taking place.

First, the Board on June 15 filed in *United States* v. *Board of Supervisors of Warren County, Mississippi, supra*—the Justice Department § 5 objection enforcement action—a motion to expand the extrajudicial 1975 District Court injunction against the 1975 county-district elections to enjoin the 1979 county-district elections as well. In a memorandum in support of their motion, the Board argued that the mere pendency of § 5 preclearance proceedings *ipso facto* freezes the electoral processes of Warren County. On July 30 the District Court—noting this Court's 1977 ruling that the three-judge District Court had exceeded the limited scope of its § 5 inquiry in enjoining the 1975 county-district elections—denied the motion for lack of jurisdiction.

Second, undaunted by the refusal of the Mississippi District Court to enjoin the 1979 county-district elections, the Board took it upon itself to prevent these elections from taking place by refusing to perform its statutory duties under Miss. Code Ann. §§ 23-5-11, 23-5-13, and 23-5-179 (1972). On July 31 the Board unilaterally re-

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[11] Miss. Code Ann. §§ 3118, 3121 (1956 Recomp.).

fused to provide the Warren County Democratic Executive Committee with the boundaries of the election districts and the poll books with which to conduct the August 7 Democratic primary for county-district officers. Again, the Board argued that its § 5 preclearance proceedings prevented any elections from taking place, even in the absence of any court order staying or enjoining the scheduled elections. On August 1, two black district candidates who qualified to run in the August 7 Democratic primary filed a petition for a writ of mandamus in the Circuit Court of Warren County to compel the Board to perform its statutory duties.[12] At a hearing on the petition, held after the District of Columbia District Court entered its decision, the Board argued again that § 5 automatically freezes the electoral processes of a covered jurisdiction until preclearance of the submitted plan has been obtained. The state court, holding that the matter was still pending in Federal court, denied the mandamus petition on August 3 (J.S., App. C).[13]

The private intervenors then filed a motion for clarification and for declaratory and injunctive relief in the District Court for the District of Columbia seeking declaratory and injunctive relief to compel the Board to hold the 1979 county-district elections on the basis of the existing districts in the pre-1970 plan. The Board re-

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[12] *Eddie Thomas, Sr., and Charlie Hunt* v. *Warren County Board of Supervisors, et al.*, Docket No. 12,190 (Cir. Ct. Warren County).

[13] After the August 7 Democratic primary, the Warren County Democratic Executive Committee determined that county-district primaries were unnecessary because only one candidate had qualified for each of the county-district offices, and certified those candidates as the Democratic nominees. Subsequently, the Board of Supervisors filed an action in the Chancery Court of Warren County seeking to enjoin the Warren County Board of Election Commissioners from placing these county-district candidates on the general election ballot as Democratic nominees. *Donnell* v. *Warren County Board of Election Commissioners*, Docket No. 27,666 (Ch. Ct. Warren County, filed August 14, 1979).

sponded that it was justified in unilaterally suspending the electoral processes of Warren County "to insure that a total destabilization of county government did not occur due to the adverse decision." [14] On August 23 the D.C. District Court issued an order declaring that "the filing of a Section 5 declaratory judgment law suit did not have the effect of 'freezing' the election process" and that the 1979 county-district elections should be conducted under the pre-1970 districts, pending preclearance of any new plan (J.S., App. B, p. 13a).

Finally, on August 30 six white voters of Warren County (including four county-district officials, but no members of the Board) filed a Fourteenth Amendment-§ 1983 action in the District Court for the Southern District of Mississippi alleging that the pre-1970 districts were unconstitutionally malapportioned, and obtained a temporary restraining order against holding the 1979 general election for district officials under the pre-1970 plan. *Herbert C. Stokes, Jr., et al.* v. *Warren County Election Commission, et al.*, Civil No. J79-0425(C) (S.D. Miss., Order of Sept. 7, 1979) (J.S., App. D, pp. 19a-23a). Three black voters, and subsequently the members of the Board of Supervisors, intervened in that action, and the United States represented by the Department of Justice appeared as amicus curiae. After two hearings, at which the District Court held the existing districts unconstitutionally malapportioned, the District Court called for the submission of proposed court-ordered plans. On September 20 the District Court adopted the Justice Department's submission as a court-ordered plan, and ordered a special election for county-district officers to be held November 27. *Stokes* v. *Warren County Election Commission, supra*, Findings of Fact, Conclusions of

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[14] Plaintiffs' Memorandum in Response to Intervenors' Motion for Clarification and for Declaratory and Injunctive Relief, Aug. 20, 1979, p. 6.

Law and Preliminary Injunction, filed Sept. 20, 1979 (J.S. App. E, pp. 25a-30a). The District Court-ordered plan provides for five supervisors' districts which are substantially equal in population, two of which are majority black—District 2, which is 65.30% black in population and 62.74% black in voting age population, and District 3, which is 67.06% black in population and 64.55% black in voting age population. Thus, under the criteria adopted by the District Court in this case, black voters of Warren County for the first time since 1967 will now have the opportunity to elect candidates of their choice to county-district office in two districts.

The decision of the D.C. District Court itself did not cause any "chaos" (J.S., p. 11); any chaos was caused by the Board itself in refusing to comply with the law and conduct county-district elections under the existing plan. To the members of the Board, the requirement that 1979 county-district elections must be conducted most certainly must be "devastating and devisive" (*id.*). Having been unlawfully elected in 1971 under a gerrymandered plan in violation of the requirements of § 5 of the Voting Rights Act, and having been perpetuated in office for eight years by an unlawful 1975 election injunction, the members of the all-white Board must now submit themselves to the democratic process under a fair and nondiscriminatory county redistricting plan.

Implementation of this court-ordered plan has been strenuously resisted by the Board. On September 18 the members of the Board filed their motion in *Stokes* to intervene, and asked the District Court to enjoin the 1979 county-district elections and to stay all further proceedings pending their appeal in this action. On September 19, the Mississippi District Court allowed their intervention, but denied their motion for a stay. On October 9 the Board appealed the *Stokes* decision to the Fifth Circuit, and on October 10 moved the Fifth Circuit for a

stay of the court-ordered plan and special election pending their appeal in this case. On October 15, the Fifth Circuit denied their motion for a stay. The Board then applied to this Court for a stay, which was denied by Mr. Justice Powell on October 26. *Clyde R. Donnell, et al.* v. *Eddie Thomas, et al.*, No. A-352.

ARGUMENT

THE DECISION OF THE DISTRICT COURT IS MANIFESTLY CORRECT, AND THIS APPEAL PRESENTS NO SUBSTANTIAL QUESTIONS WHICH REQUIRE PLENARY CONSIDERATION BY THIS COURT.

The only question presented in this appeal is whether the District Court for the District of Columbia correctly applied the statutory criteria of § 5 of the Voting Rights Act and the controlling decisions of this Court in holding that plaintiffs had failed to meet their § 5 burden of proving that their new plan had no racially discriminatory purpose or effect. Under the facts of this case, and controlling legal precedents, the District Court's decision is manifestly correct.

There is no dispute that the Board of Supervisors—as plaintiffs—had the burden of proving that their proposed plan "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c; *Beer* v. *United States*, 425 U.S. 130, 140 (1976); *City of Richmond* v. *United States*, 422 U.S. 358, 362 (1975); *Georgia* v. *United States*, 411 U.S. 526, 538 (1973). In determining whether plaintiffs had met their burden, the District Court correctly applied the controlling decisions of this Court. Thus, on the issue of racially discriminatory effect,[15] the District Court correctly held:

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[15] Appellants in relying exclusively on *Beer* v. *United States*, *supra*, which concerned only the "effect" standard of § 5, appar-

> "In order to prove the absence of discriminatory effect, plaintiffs must show that the voting change at issue would not lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise. *Beer* v. *United States*, 425 U.S. 130, 141 (1976); *State of Mississippi* v. *United States*, Civil Action No. 78-1425 (June 1, 1979, D.D.C.), Conclusions of Law No. 10." J.S., App. A, p. 11a (Conclusions of Law, No. 9).

On the facts showing that the proposed districts fragmented and dispersed all three majority black districts in the existing plan, reduced the number of districts which were majority black in population from three to two, and substantially reduced the black population and voting age population percentages contained in all three majority black districts to the point where "it is unlikely that black citizens will be able to elect a candidate of their choice in any of the districts" (J.S., App. A, pp. 9a-10a), the District Court correctly held that plaintiffs had failed to meet their burden of proving that the proposed plan would not diminish black voting strength.

Appellants contend that consideration by the District Court of any of the factors governing the conditions under which black voters may elect candidates of their choice is inconsistent with this Court's decision in *Beer* v. *United States, supra.* Thus, they contend that the District Court contravened *Beer* in making findings concerning the past history of discrimination in the voting process, the disproportionately low level of black regis-

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ently do not challenge the holdings of the District Court that they failed to prove that the plan did not have a racially discriminatory purpose. In any event, the unchallenged findings of fact of the District Court are sufficient to sustain the conclusion that the absence of a racially discriminatory purpose had not been shown. See, e.g., *Connor* v. *Finch*, 431 U.S. 407, 421-26 (1977); *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); *Robinson* v. *Commissioners Court*, 505 F.2d 674 (5th Cir. 1974).

tration, the disproportionately lower socio-economic position of black citizens, racial bloc voting, and the historic exclusion of black representation in county government (J.S., pp. 13-21).

There is no conflict with *Beer*. In that case this Court explicitly held (425 U.S. at 141):

> "When it adopted a 7-year extension of the Voting Rights Act in 1975, Congress explicitly stated that 'the standard [under § 5] can only be fully satisfied by determining on the basis of the facts found by the Attorney General [or the District Court] to be true whether the ability of minority groups to participate in the political process and to elect their choices to office is *augmented, diminished, or not affected* by the change affecting voting . . . .' H.R. Rep. No. 94-196, p. 60 (emphasis added). In other words the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." (Footnote omitted.)

Thus, under *Beer* findings on the current conditions under which black voters can gain representation is absolutely necessary to a determination whether their ability "to elect their choices to office is *augmented, diminished, or not affected* by the change affecting voting . . . ." and to a determination on the effect of the change "with respect to their *effective exercise* of the electoral franchise" (emphasis added).[16]

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[16] Analysis of what appellants characterize as *White* v. *Regester*, 412 U.S. 755 (1973), voter-dilution criteria (J.S., p. 17) showing denial of equal access to the political process may also be relevant in § 5 cases to a determination whether proposed voting changes "continue so to discriminate on the basis of race or color as to the unconstitutional." *Beer* v. *United States, supra*, 425 U.S. at 142 n.14. See, e.g., *Connor* v. *Finch, supra*, 431 U.S. at 422 n.22.

The District Court's finding that districts must be 60% black in voting age population to enable black voters to elect candidates of their choice is neither inconsistent with *Beer* nor arbitrary. In *Beer*, actual figures of registered voters were available and considered to determine whether blacks had a voting majority in any of the challenged districts (425 U.S. at 135-36, 142). In Warren County, there are no records showing the present number of registered voters by race (J.S., App. A, p. 3a); hence racial population and voting age population figures must be used to determine the effect of the new plan on present levels of black voting strength. Further, the District Court's finding on this issue is directly supported by the factual record. Plaintiffs' own expert witness, Dr. Linda Malone, a statistician from Mississippi State University, conceded that in Warren County an election district would have to be at least 63.06% black in population and 59.6% black in voting age population for a black candidate to be successful.[17]

Appellants are not even consistent in their argument on what questions are presented in this appeal. After arguing for nine pages in their Jurisdictional Statement that the decision of the District Court "is at war with *Beer*" (J.S., p. 21), they then take the tack that the *Beer* analysis is not even relevant to this case (J.S., pp. 21-23). In doing so, appellants make the remarkable concession that under the *Beer* test their plan is retrogressive:

> "The issue, therefore, is not an increase of black-majority districts as in *Beer*. What is involved is an overall upgrading in black voting strength *albeit the percentage level previously attained (in one district) has been reduced.*" J.S., p. 22 (last emphasis added).

Appellants' argument that the equalization of county-maintained road mileage and bridges "deemed funda-

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[17] Deposition of Dr. Linda Malone, pp. 16, 92, Ex. P-5.

mental to improving the day-to-day functioning of county government" (J.S., p. 21) should justify dilution of black voting strength in the proposed plan also fails to present a substantial question. The District Court found that pursuit of this criterion failed to defeat the other evidence of a discriminatory purpose and effect because this purported criterion had not been utilized until after passage of the Voting Rights Act, equalization of these factors did not justify fragmentation of black voting strength in Vicksburg because the county has no responsibility for road and bridge maintenance in Vicksburg, and plaintiffs had failed to show that nondiscriminatory alternatives were not available (J.S., App. A, pp. 7a-8a, Findings of Fact Nos. 27-31). These findings are not challenged as clearly erroneous in this appeal. Thus, consideration of this criterion does not take this case out of the *Beer* analysis, and the District Court's disposition of this issue is entirely consistent with the holdings of other courts which have rejected county road equalization as a justification for racial discrimination in redistricting. See, e.g., *Kirksey* v. *Board of Supervisors of Hinds County, Mississippi*, 554 F.2d 139, 151 (5th Cir.) (*en banc*), *cert. denied*, 434 U.S. 968 (1977); *Robinson* v. *Commissioners Court*, 505 F.2d 674, 680 (5th Cir. 1974); cf. *Avery* v. *Midland County*, 390 U.S. 474, 484 (1968).[18]

Finally, the District Court did not err in failing to retain jurisdiction to review some other plan which plaintiffs might want to submit (J.S., pp. 23-25). Once the District Court had denied the requested declaratory judg-

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[18] To bootstrap their argument, appellants improperly rely on findings in a three-judge court decision which was reversed by this Court in *United States* v. *Board of Supervisors of Warren County, supra*, (J.S., p. 22 n.46). It is significant that one judge of that District Court, Circuit Judge Charles Clark, disregarded this criterion in ordering into effect for the November 27 special election a court-ordered plan which creates one district entirely within the city limits of Vicksburg (J.S., App. E, p. 27a).

ment, its § 5 jurisdiction technically was exhausted. The procedures of § 5 remain open to appellants to seek preclearance of a new plan either through submission to the Attorney General or through the filing of a new declaratory judgment action. No disruption of the electoral processes will occur since the county-district elections—the first since 1971—are scheduled to take place on November 27 under the new court-ordered plan ordered into effect in conformity with this Court's teachings in *Wise* v. *Libscomb*, 437 U.S. 535 (1978).

The action of the District Court here shows the continued efficacy of § 5 as a mechanism for blocking new schemes designed to eviscerate the gains made by passage of the Voting Rights Act. The enforcement of § 5 in this case was done, not in aid of any "affirmative action" program as appellants charge (J.S., p. 25), but to preserve preexisting levels of minority voting strength and to prevent them from being unalterably eroded. The District Court amply cited and followed the teachings of this Court in *Beer* in reaching its decision, and no substantial issues are presented.

CONCLUSION

The judgment of the District Court should be summarily affirmed.

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November 26, 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-555

CLYDE R. DONNELL, ET AL., *Appellants*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*

On Appeal from the United States District Court for the District of Columbia

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BRIEF OPPOSING MOTIONS TO AFFIRM

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BRIEF OPPOSING MOTIONS TO AFFIRM

Waving the banner of "fragmentation and dilution" amid gratuitous racial characterizations,[1] appellees

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[1] *E.g.*, Motion to Affirm by Private Appellees 2-3 ("all white county government" engaged in "repeated racial gerrymandering"). Having successfully blocked elections in 1976, private appellees' detailed exploitation of the facts in an attempt to impute illicit motivation falls short of the mark. Specifically, there is nothing in this record which would indicate anything other than a tedious, long drawn out process in which appellants' attempts to comply with *Beer* have been rejected on the basis of alleged fragmentation and dilution, *i.e.*, failure to concentrate black voters.

take an intellectual quantum leap in asserting that the 60/65% rule[2] is a reasoned application of *Beer* v. *United States*, 425 U.S. 130 (1976). As now articulated, the phrase "effective exercise of the electoral franchise" as used in *Beer* equates with a predetermined percentage level which will give blacks an "equal chance" (obviously more than "some possibility")[3] to elect candidates of their choice. Thus, now armed with the lower court's construction of § 5, staff attorneys and subprofessionals employed by the Voting Rights

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[2] Private appellees assert, *id.* at 18, that appellants' expert agrees with the 65% breakoff. The portion of the deposition cited, however, relates to the *fact* that on the basis of past performance, if private appellee Eddie Thomas ran for office again, he would indeed require a 65% district in order to be elected. Subsequently, even this concession proved erroneous. In the special election conducted on Dec. 11, 1979, Mr. Thomas ran in District 3 which was computed to have a 67% black population and a 64.5% black VAP. Jurisdictional Statement App. E at 27a. In his race against a white candidate Mr. Thomas received only 765 votes to his opponent's 991.

Mr. Thomas' propensity to become the Harold Stassen of Warren County bears no relationship to candidates from the black community capable of mustering broad-based support. Compare Melvin Redmond dep. at 4, 13-15 (testimony of black city councilman detailing election in which whites worked actively in his campaign). Finally, the Government's assertion that appellants do not contest the validity of the 60/65% rule is frivolous. *Compare* Motion of the United States to Affirm 8 n.5 *with* Jurisdictional Statement 14 n.17. See also Rule 15(c) (questions fairly comprised in Jurisdictional Statement will be considered).

[3] See Motion of the United States to Affirm 9 n.6 (articulating the distinction for purposes of justifying position taken in United States v. Mississippi, Doc. No. 79-504. The approach advocated in the latter case is, of course, based on the recent election of Melvin Redmond. See note 2, *supra*. The unanswered question: Why isn't this approach also applicable to county redistricting?

Section are authorized to review submissions in a metaphysical environment which includes the assessment of

> such matters as the history of political participation by blacks . . . the effects of past discrimination, the results in county elections, and the relative rates of voter registration and voter turnout for blacks and whites. In this way [the Attorney General is] able to assess the effect of [a] proposed plan on the *effective exercise* by blacks of their franchise.[4]

Having performed a "dry run" on Warren County, how this works in fact is easily described. First, the Department rejects a submission on the basis that the required number of 60/65% districts are not in the proposal.[5] Second, the reasons given for rejection incorporate alleged transgressions of both the "effect" and "purpose" proscriptions of § 5. With respect to the former, if there are districts beneath the required level the "effect" of the proposal is necessarily to diffuse what the Department has determined to be "effective" exercise of the franchise.[6] With respect to the latter,

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[4] Motion of the United States to Affirm 11.

[5] Laying aside the Government's assertion that the meaning of "effective" exercise will vary from case to case, *id.* at 10, past performance does not indicate a (lady or the tiger) scenario. As may be derived from *UJO*, United States v. Mississippi, and the instant case, the 65% dragon is not a myth, *i.e.*, it is firmly ingrained into Department personnel that this level, and *only this level*, is sufficient to offer an "opportunity" for blacks to elect a candidate of their choice regardless of the jurisdiction involved. Moreover, the interesting suggestion that the percentage level will vary leaves yet another crucial question unanswered: How are professionals employed to design redistricting plans to secure the information necessary *vis-a-vis* the magical level?

[6] As did the Department, private appellees also suggested "alternatives" to the submission in question. The "non-dilution"

since *Beer* requires that racial characteristics of a population be taken into consideration (in order that retrogression does not occur), lines knowingly drawn in a manner which invade black population concentrations in a format producing districts beneath the required population/VAP level must necessarily be drawn with a discriminatory purpose.[7] Finally, presuming utilization of the declaratory judgment procedure, department personnel then employ an *after the fact* scenario, *i.e.*, gathering data concerning low black registration, socio-economic status, past failures to elect candidates, bloc voting and the like[8] which—as defined by the lower court—are sufficient to justify the 60/65% level.

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argument is best described by Mr. Henry Kirksey, an advocate planner employed by this group:

> Q. . . . But when you did this [draft], part of your objective was to maximize black voting strength in that area.
>
> A. *To minimize the dilution.*
>
> Q. But, in turn, *to increase as much as possible black voting strength.*
>
> A. *Yeah, to prevent . . . fractionalization of the black voting strength.*
>
> . . . .
>
> Q. You, in essence have concentrated black voting strength, correct?
>
> A. What I have done is minimize the dilution of black voting strength. [Kirksey dep. at 94, 104 (Emphasis added.)]

[7] As previously noted, shape is irrelevant. See Jurisdictional Statement, Map 4 (Department of Justice alternative).

[8] A relatively easy chore compared with definitive evidence which must be amassed in a voter-dilution case. The reason for a dearth of findings in the instant case as compared say, to those in Bolden v. City of Mobile, Doc. No. 77-1844, is the *fact* that—after 1,800 pages of depositions—appellees have been unable to develop the type and quality of evidence needed to substantiate findings of that caliber. Indeed, appellants approached the entire discovery process with a singular purpose of developing evidence for the successful defense of a voter-dilution case they were cer-

The Solicitor General next postulates the "fragmentation and dilution" argument in the context of discriminatory effect and/or purpose because: (1) appellants "failed to justify" [9] the plan's shape; and (2) "failed to show that there were no alternatives" [10] that would achieve the equalization objective without "severely fragmenting" [11] black population concentrations. The process utilized in developing the plan has been described.[12] The total refusal by appellees in their briefs to deal with the realities of what actually occurred requires that it be repeated here.

There is *no dispute* that, other than issuing instructions that dual incumbancy not occur, appellants' only stated objective was the development of a plan that would be acceptable under § 5 and equalize, as much as possible, road and bridge-maintenance responsibilities. CPI, acting on the advice of counsel to produce two substantial black districts, divided up the rural areas of the county (that outside the city limits of Vicksburg) on a road-mileage-bridge-maintenance basis and, *taking the population and racial characteristics of these five areas as given,* undertook the tedious task of drawing lines into the city in a manner which would produce a plan complying with Fourteenth Amendment

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tain would be filed after preclearance. This expensive decision was, however, unnecessary under the approach taken by the Court below.

[9] Motion of the United States to Affirm 11.

[10] *Id.* at 12.

[11] *Id.*

[12] See Jurisdictional Statement 21-22. It is, of course, appellants' position that under *Beer* there is no requirement that shape be justified. The existence of other alternatives is also irrelevant.

standards [13] and this Court's mandate in *Beer*. Simply stated, the plan assumed its present characteristics as the result of purposeful, premeditated line drawing *by a professional* charged with the dual responsibility of drafting a plan complying with the Fourteenth Amendment and § 5 of the Voting Rights Act while—at the same time—meeting perceived governmental objectives with respect to equalization of maintenance responsibilities. The plan upgrades, and having responded affirmatively to *Beer*, Warren County's submission fits Mr. Justice Stewart's analysis in *UJO* with exactness:

> The clear purpose with which the New York legislature acted—in response to the position of the United States Department of Justice under the Voting Rights Act [as Warren County has with respect to the mandate of *Beer*]—forecloses any finding that it acted with an invidious purpose. . . .[14]

CONCLUSION

Although what this small, discrete jurisdiction and its elected representatives have undergone the past ten years in their dealings with the Voting Rights Section will never be adequately described, the massive litigation concerning Warren County redistricting has had and will continue to have devastating political consequences for the appellants and the community in gen-

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[13] If error was committed, *i.e.*, a step in the entire process which might have resulted in the drafting of a plan having differing characteristics, it was the retention of a planner with one-man-one-vote phobia. With the population in the neighborhood of 9,000 representing a median, the proposed districts contain populations of 9003, 9005, 8908, 9056 and 9009 respectively. See Jurisdictional Statement, Appendix A at 7a.

[14] United Jewish Org., Inc. v. Carey, 430 U.S. 144, 180 (1977) (Stewart, J., concurring).

eral. Now rewarded with court-ordered elections and the beneficiary of two 65% districts (with one entirely within the city limits of Vicksburg) appellants seek vindication of their position that *no minority group* has a statutory or constitutional right to elect officials "in proportion to their voting potential." [15] Ultimately, of course, appellants contend that if § 5 is to function as intended by Congress the message must be conveyed in *unmistakable language* that so long as "upgrading" occurs in the *Beer* sense it is for elected officials, not the Department of Justice or a § 5 court, to determine what percentage figures are necessary "to ensure the opportunity for the election of minority representatives." [16] The game is worth the candle. Warren County and its now court-imposed 65% districts are but a prelude to what every covered jurisdiction in the United States can expect if the lower court decision stands.

Respectfully submitted,

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Vicksburg, Mississippi 39180

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Washington, D.C. 20036

Of Counsel

October, 1979

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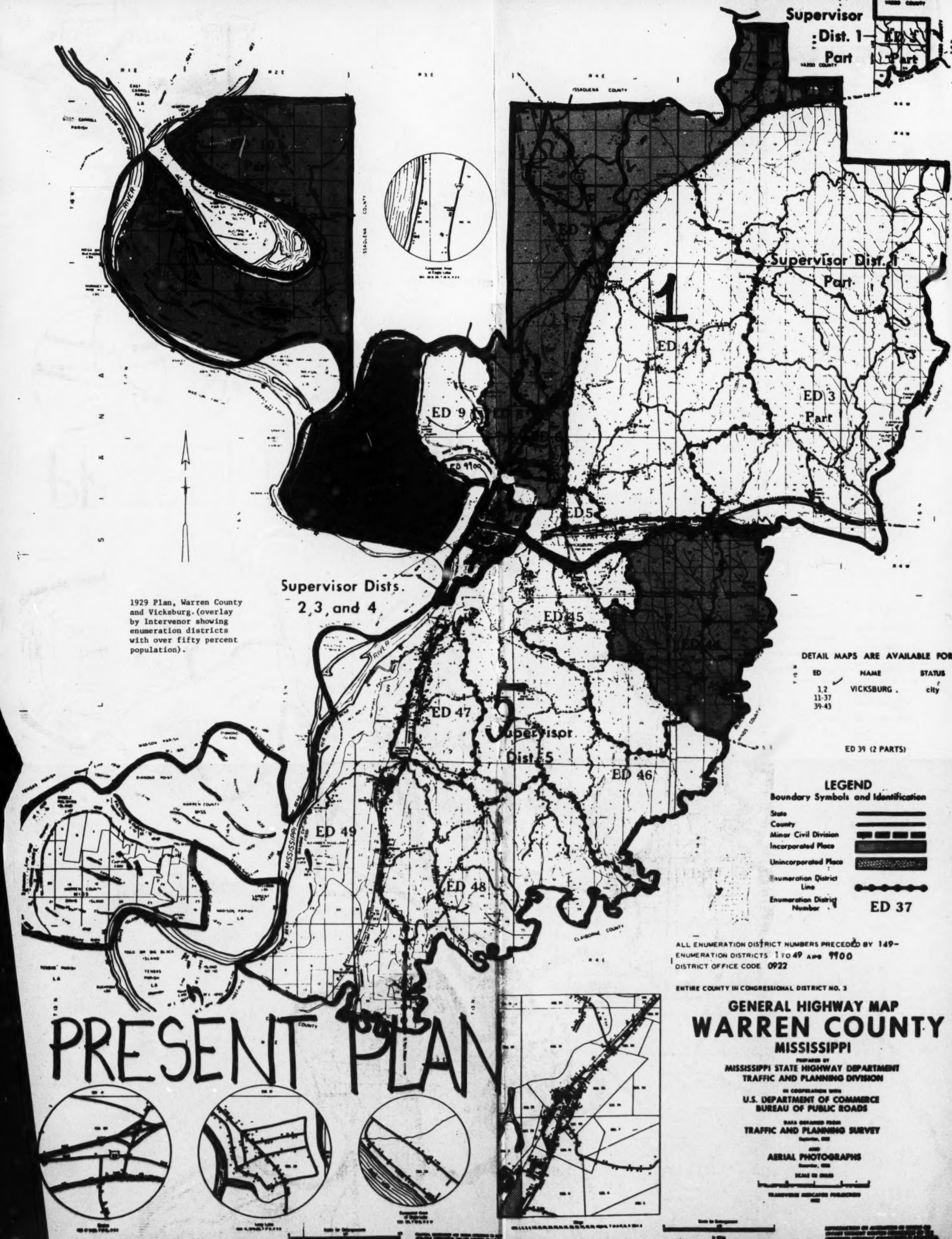
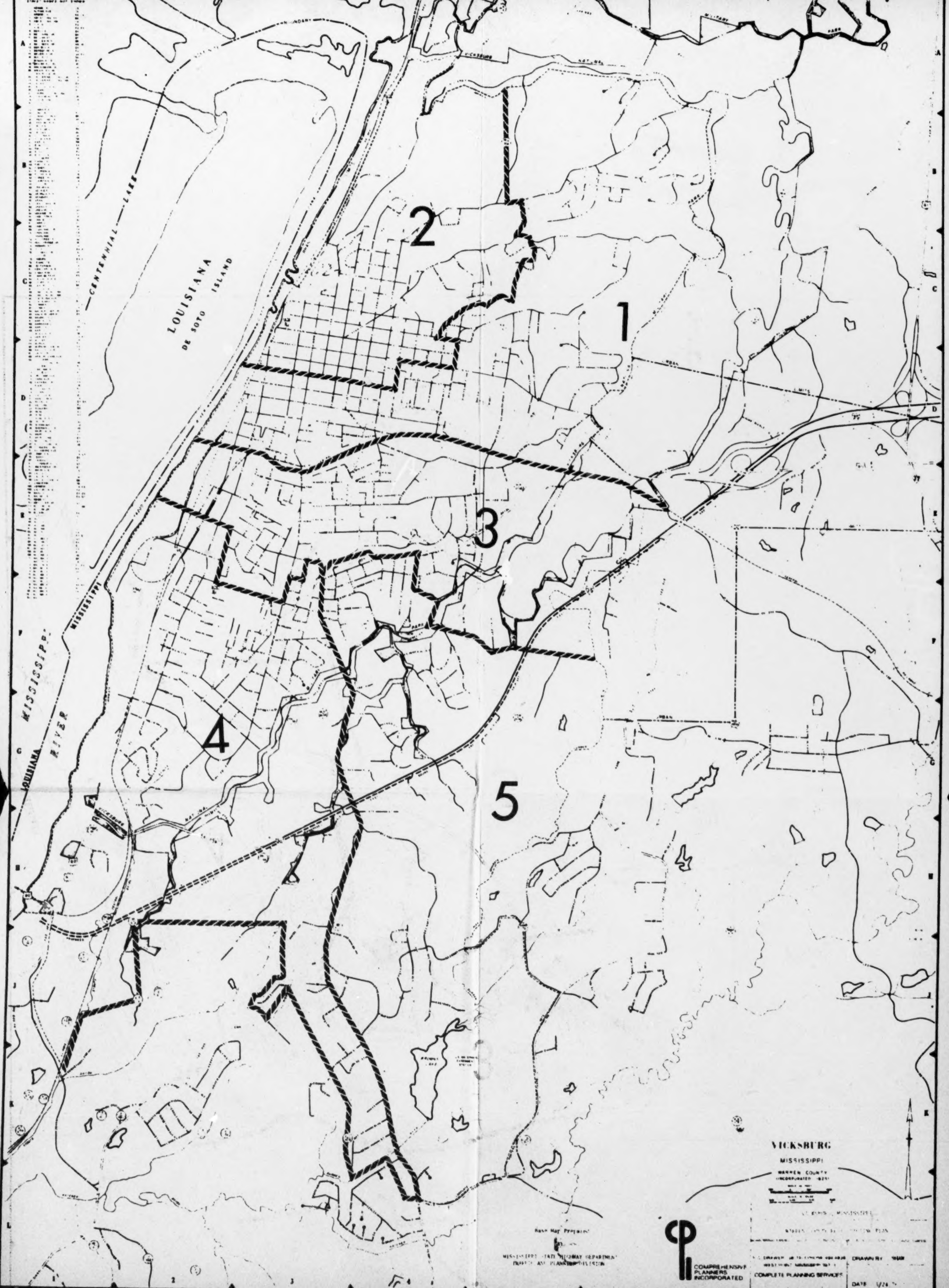
[15] Beer v. United States, 425 U.S. 130, 136 n.8 (1976). With 41% of the population, the lower court's requirement of two 65% districts out of five is a mandate of proportional representation.

[16] United Jewish Org., Inc. v. Carey, 420 U.S. 144, 162 (1977).

PRESENT PLAN



1929 Plan, Warren County and Vicksburg. (overlay by Intervenor showing enumeration districts with over fifty percent population).


LOUISIANA
DE SOTO ISLAND
CENTENNIAL
LAKE
MISSISSIPPI
RIVER
1
2
3
4
5
VICKSBURG
MISSISSIPPI
WARREN COUNTY
COMPREHENSIVE PLANNERS INCORPORATED
COMPLETE PLANNING SERVICES

Supervisor Dist. 1 Part

ED 3 Part

ED 10 Part

ED 9

ED 9100

ED 5

ED 7

ED 4

Supervisor Dist. 1 Part

Supervisor Dists. 2, 3, and 4

ED 45

ED 47

Supervisor Dist. 5

ED 46

ED 49

ED 48

DETAIL MAPS ARE AVAILABLE FOR:

ED	NAME	STATUS
1,2 11-37 39-43	VICKSBURG	city

ED 39 (2 PARTS)

LEGEND

Boundary Symbols and Identification

- State
- County
- Minor Civil Division
- Incorporated Place
- Unincorporated Place
- Enumeration District Line
- Enumeration District Number — ED 37

ALL ENUMERATION DISTRICT NUMBERS PRECEDED BY 149-
ENUMERATION DISTRICTS 1 TO 49 AND 9100
DISTRICT OFFICE CODE 0922

ENTIRE COUNTY IN CONGRESSIONAL DISTRICT NO. 3

GENERAL HIGHWAY MAP
WARREN COUNTY
MISSISSIPPI

PREPARED BY
MISSISSIPPI STATE HIGHWAY DEPARTMENT
TRAFFIC AND PLANNING DIVISION

IN COOPERATION WITH
U.S. DEPARTMENT OF COMMERCE
BUREAU OF PUBLIC ROADS

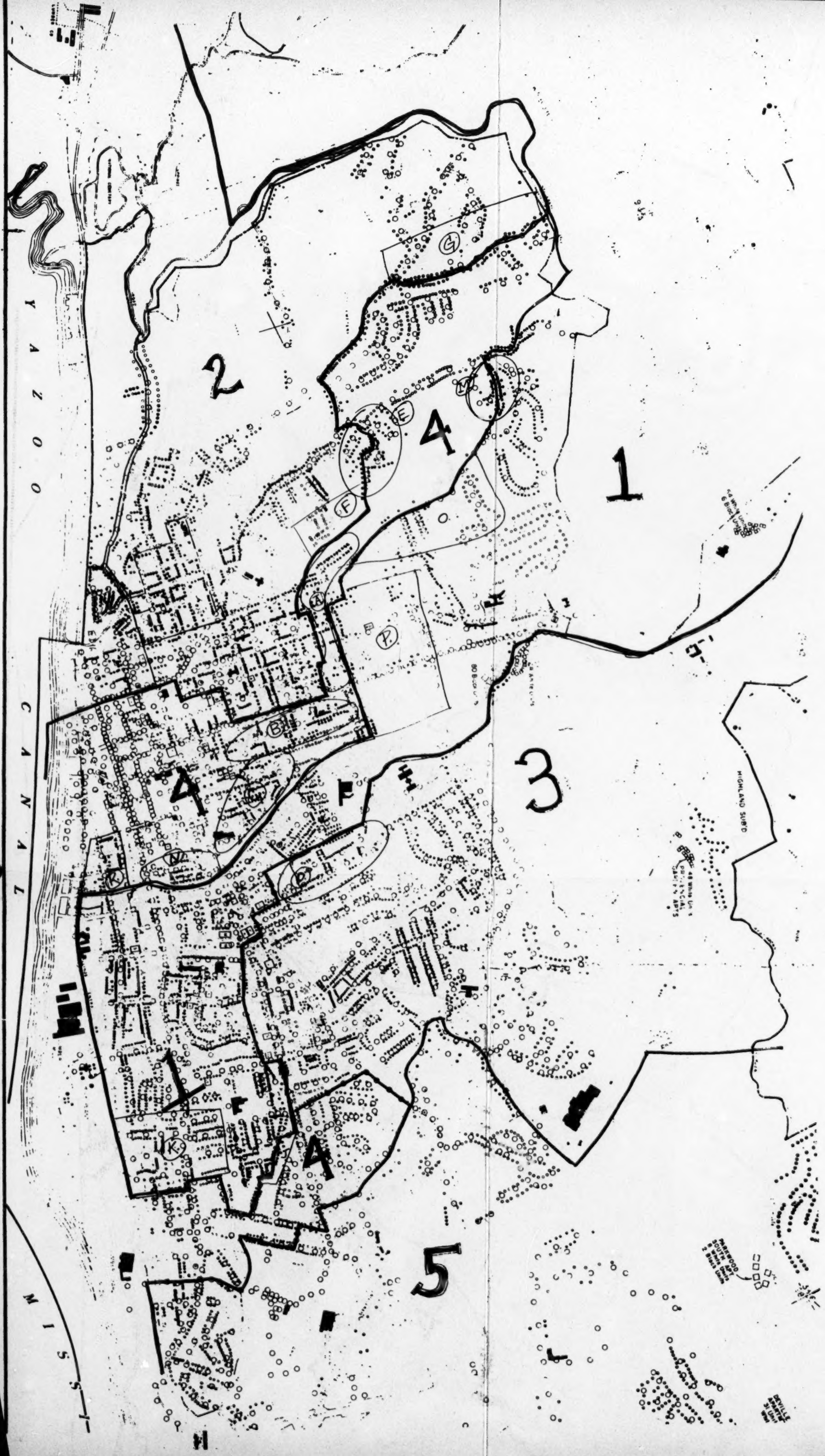
DATA OBTAINED FROM
TRAFFIC AND PLANNING SURVEY
[illegible], 1960

AND
AERIAL PHOTOGRAPHS
[illegible], 1960

SCALE IN MILES

TRANSVERSE MERCATOR PROJECTION
1960

Proposed plan, Warren County and Vicksburg. (overlay by Intervenors showing enumeration districts with over fifty percent black population).


YAZOO
CANAL
MISSISSIPPI
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D
K
HIGHLAND SUBD
DEVILLE APARTMENTS